

VOLUME NO. 37

OPINION NO. 6

NEPOTISM - School Board Trustees, appointment of relatives of members; SCHOOL BOARDS - Nepotism, appointment of relatives of members; REVISED CODES OF MONTANA, 1947 - Sections 59-519, 91-406 through 91-410, 94-1-102.

HELD: It is unlawful under section 59-519, R.C.M. 1947, for a school board to accept the resignation of a member, approve the promotion of that member's sister-in-law as an employee of the board, and then immediately re-appoint the resigned member to fill his own vacant position.

28 February 1977

Robert L. Deschamps, III,  
Missoula County Attorney  
Missoula County Courthouse  
Missoula, Montana 59801

Dear Mr. Deschamps:

You have requested my opinion on the following question:

Is it lawful for a school board of trustees to accept the resignation of one of it's members after which it appoints that resigned trustee's sister-in-law to a vacant position as "administrative secretary" and subsequently appoints the resigned trustee to fill his original trustee position?

In Montana the regulation of "nepotism" is governed by section 59-519, R.C.M. 1947, which 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.

Since its enactment in 1933, this provision has been the subject of numerous Attorney General's Opinions and some court decisions. It applied to actions of school board trustees. State ex rel. Kurth v. Grinde, 96 Mont. 608 (1934). It is unlawful for the person related within the restricted degree of kinship, as well as the other members of the board, to make an appointment in violation of the statute. 15 OP. ATT'Y GEN. NO. 179. The prohibited degrees of relationship by affinity are determined the same as those of consanguinity. State v. School District No. 13, 116 Mont. 294 (1944); 19 OP. ATT'Y GEN. NO. 84; 24 OP. ATT'Y GEN. NO. 49; section 91-406 through 91-410, R.C.M. 1947. Abstention from voting by the related board member does not circumvent the prohibition of the act. 34 OP. ATT'Y GEN. NO. 3. There is no violation of the act for an employee hired during a previous board's administration to continue to serve after the election of a relative to the board. Id. The act is violated, however, if the new board reviews, reappoints or rehires an employee hired prior to the relative's assumption of office. Id.

Applying these rules to the present facts, it is clear that the employee sister-in-law is related to the board member brother-in-law by affinity within the second degree, sections 91-406 to 91-410, R.C.M. 1947. The sister-in-law could have continued her previous employment without a statutory violation, but it would violate the act for the new board, of which her brother-in-law is a member, to appoint her to a higher position. Thus, at the point at which the brother-in-law resigned from the board and the sister-in-law was appointed, no violation of the statute had occurred.

The question then is whether the total action of the board in accepting the resignation, appointing the sister-in-law, and immediately re-appointing the brother-in-law violated the act. This question must be answered in the affirmative since the board's actions were patently a ruse to avoid the clear intent of the act.

The rule of statutory construction in Montana, now codified at section 94-1-102, R.C.M. 1947, which has been held applicable to section 59-519 (State ex rel. Kurth v. Grinde, supra), is as follows:

The rule of common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice. (Emphasis added.)

Thus, the intent of the nepotism statute is not to be strictly construed so as to countenance technical schemes to avoid its consequences. A public office is a public trust (State v. Eaton, 114 Mont. 199 (1942)), and every public office is created in the interest and for the benefit of the people (Bonner v. District Court, 122 Mont. 464 (1949)). A school board is required to follow the law (Wyatt v. School District No. 104, 148 Mont. 83 (1966)).

The purpose of nepotism prohibitions is to eliminate abuses by public officials appointing relatives to the public payrolls. State ex rel. McKittrick v. Whittle, 63 S.W.2d 100 (Mo. 1933). When section 59-519 is liberally construed to effectuate its purpose, it is obvious that the intent of the second sentence thereof is to prohibit the practice in the instant situation. That provision makes it unlawful to "enter into any agreement or any promise" with board members to appoint a person related within the prohibited degrees. The facts in the instant case show that there was prima facie at least a tacit agreement among those involved to have the brother-in-law resign just long enough to allow the remaining board members to promote the sister-in-law. This conclusion is bolstered by the fact that there was no effort made by the board to appoint anyone else to the vacant seat. The promotion of the sister-in-law and the re-appointment of the brother-in-law were accomplished at the same meeting. If the nepotism statute could be so easily avoided, its prohibitions would be meaningless.

In 18 OP. ATT'Y GEN. NO. 23, a situation arose in which county commissioners sought to avoid the nepotism statute by dividing the county into districts and providing that the respective commissioners had sole responsibility for hiring, firing, and supervision of road maintenance personnel in his district. The commissioners argued that the arrangement

permitted a commissioner to hire the brother of another commissioner who was in charge of a separate district. The Attorney General found that this was only a plan devised to allow employment of the brother and thus violated the nepotism statute.

THEREFORE, IT IS MY OPINION:

It is unlawful under section 59-519, R.C.M. 1947, for a school board to accept the resignation of a member, approve the promotion of that member's sister-in-law as an employee of the board, and then immediately re-appoint the resigned member to fill his own vacant position.

Very truly yours,

MIKE GREELY  
Attorney General