

NEPOTISM - Application of nepotism laws to tenured teachers;

NEPOTISM - Effect on nepotism laws of 1985 legislative amendments to Human Rights Act and Governmental Code of Fair Practices;

NEPOTISM - Overruling of previous nepotism opinions;

SCHOOL BOARDS - Effect of nepotism laws when tenured teacher is related to school board member;

TEACHERS - Application of nepotism laws to tenured teachers;

MONTANA CODE ANNOTATED - Sections 2-2-301 to 2-2-304, 20-4-201, 20-4-203 to 20-4-207, 49-2-303(3), 49-3-201(5);

OPINIONS OF THE ATTORNEY GENERAL - 18 Op. Att'y Gen. No. 23 (1939), 34 Op. Att'y Gen. No. 3 (1971), 37 Op. Att'y Gen. No. 6 (1977), 39 Op. Att'y Gen. No. 67 (1982).

- HELD: 1. The nepotism statutes, §§ 2-2-301 to 304, MCA, prohibit the rehiring of a tenured teacher where the teacher is within one of the prohibited relationships to a member of the school district board of trustees.
2. The 1985 amendments to the Human Rights Act and the Governmental Code of Fair Practices, §§ 49-2-303(3) and 49-3-201(5), MCA, overruled 39 Op. Att'y Gen. No. 67 (1982), insofar as it holds that the nepotism law does not apply to relationships by affinity.
3. 34 Op. Att'y Gen. No. 3 (1971) is overruled insofar as it is inconsistent with this opinion.

11 April 1986

James C. Nelson
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Glacier County Courthouse
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Dear Mr. Nelson:

You requested my opinion on the following question:

Do the nepotism statutes, §§ 2-2-301 to 304, MCA, prohibit the rehiring of a tenured teacher where the teacher is within one of the prohibited relationships to a board member?

It is my opinion that tenured teachers are not exempt from the nepotism laws. This opinion overrules in part an opinion issued by my predecessor (34 Op. Att'y Gen. No. 3 (1971)), and an opinion issued by me in which I stated that a board of trustees could hire the sister-in-law of a board member (39 Op. Att'y Gen. No. 67 (1982)).

The current state of the law requires a reevaluation of the prior opinions expressed by this office. The law now requires that I reach a conclusion which will have an unfavorable, yet unavoidable, effect on tenured teachers and their relatives serving on school boards.

The nepotism statutes, §§ 2-2-301 to 304, MCA, were enacted in 1933 and have remained essentially unchanged. The intent of the statutes is to prevent favoritism and conflicts of interest by public agencies in hiring, and to concentrate on the applicant's merit and qualifications. § 2-2-301, MCA.

Section 2-2-302(1), MCA, 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.

Section 20-4-203, MCA, defines teacher tenure. It reads:

Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher

certification except as a district superintendent or specialist, the teacher shall be deemed to be reelected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with such teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204.

The teacher tenure laws also have specific purposes. They provide security in tenured teachers' positions and protection against removal for unfounded reasons. The tenure laws benefit the public as well by assuring a competent and efficient teaching force. Smith v. School District No. 18, 115 Mont. 102, 139 P.2d 518, 523 (1943); State v. District Court, Fergus County, 128 Mont. 353, 275 P.2d 209, 214 (1954). Tenure confers upon teachers a substantial valuable and beneficial right that cannot be taken away except for good cause. Massey v. Argenbright, 41 St. Rptr. 1393, 683 P.2d 1332, 1334 (1984).

Tenure differs from nontenure status in that a tenured teacher may not be removed without cause, nor without an opportunity to a statutorily-defined grievance procedure involving notice and opportunity to be heard on the reasons for removal. § 20-4-204, MCA; Massey v. Argenbright, supra. On the other hand, nontenured teachers may be removed without cause, and are not entitled to a hearing but only to a statement of reasons for their removal. § 20-4-206, MCA; Board of Trustees of Billings School District No. 2 v. State of Montana, 185 Mont. 89, 604 P.2d 770, 776 (1979).

While the nepotism statutes and the teacher tenure statutes have not undergone recent changes which affect this issue, there was an addition to the Montana statutes regarding employment discrimination and government hiring which is relevant. In 1985, the Legislature amended the Human Rights Act and the Governmental Code of Fair Practices by adding the following provision:

Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

§§ 49-2-303(3), 49-3-201(5), MCA. Such a statement evidences a legislative intent to require general compliance with the nepotism laws. Therefore, my conclusion in 39 Op. Att'y Gen. No. 67 (1982) that the Human Rights Act overrides the nepotism statutes in certain situations is no longer valid. The latter now specifically apply and require that nepotism be prohibited in all situations involving public hiring, including the hiring of tenured teachers.

In 34 Op. Att'y Gen. No. 3, the conclusion that tenured teachers were not subject to the nepotism laws was based on two cases. In one, the Florida Supreme Court found its state's particular nepotism laws inapplicable to tenured teachers, because in those situations merit was supposed to be the primary consideration. State ex rel. Robinson v. Keefe, 149 So. 638 (Fla. 1933).

In light of the current state of Montana law on this issue, I do not adopt the Florida Supreme Court's reasoning. First, Montana's nepotism laws make no distinction between jobs with prerequisite qualifications and jobs with none, as the Florida Court interpreted its laws. Second, if I were to take the Florida court's position, most public employment situations would be exempt from our nepotism laws. Clearly, that is not what our Legislature intends. See §§ 49-2-303(3), 49-3-201(5), MCA. Finally, unlike the Florida court, which held the school statutes to supersede the nepotism law, the Montana Supreme Court has unequivocally stated that the teacher's contract rights "are not governed by [the tenure laws] to the exclusion of all other applicable laws and circumstances." State ex rel. Hoagland v. School District No. 13 of Prairie County, 116 Mont. 294, 151 P.2d 168, 170 (1944).

The second case struck down a nepotism law as it affects principals, tenured teachers, and board members where the related board member did not need to exercise any power of supervision or employment over the teacher or principal. The court held that the effect of the nepotism law was not constitutionally sufficient to

deprive the tenured employee of his valuable property right. Backman v. Bateman, 263 P.2d 561 (Utah 1953).

The holding of the Backman case is also inapplicable to Montana's nepotism and tenure laws. The nepotism law in Utah addressed retention in employment as well as hiring, and prohibited relatives from employment situations in that regard. Furthermore, unlike the process in Utah, school boards in Montana are always involved in renewing teaching contracts: They have the final say in rehiring tenured teachers. Finally, tenure rights in Backman were not the same as those presently existing in Montana. The extent of tenure rights depends entirely on the tenure statutes. Day v. School District No. 21 of Granite County, 98 Mont. 207, 38 P.2d 595, 597 (1934).

The next question is at what point the nepotism laws affect tenured teachers. The nepotism statutes govern the hiring process. § 2-2-302(1), MCA. Therefore, they apply to the initial hiring of a teacher and the renewal of such a contract in following years. If tenured teachers are thereafter hired on a yearly basis, the nepotism laws will apply to the yearly renewal of the contract.

The pertinent statutes indicate that tenured teachers are hired on a yearly basis. Section 20-4-201, MCA, requires teachers to be employed by written contract. Sections 20-4-204 and 20-4-205, MCA, instruct the trustees to provide, by April 1 of every year, written notice to tenured teachers of a recommendation for termination or reelection. Upon receiving the notification of reelection, the teachers must provide the trustees with written acceptance of the conditions. Failure to provide the written acceptance constitutes conclusive evidence of nonacceptance. Therefore, compliance with section 20-4-205, MCA, fulfills the requirement of a written contract set by section 20-4-201, MCA. And because section 20-4-205, MCA, requires that notification be made each year, it can be said that the tenured teachers are hired on a yearly basis.

This conclusion is not inconsistent with the Montana Supreme Court's holding in Yanzick v. School District No. 23, 39 St. Rptr. 191, 641 P.2d 431 (1982), regarding the termination of tenured teachers. The Court

initially recognized the distinction between the dismissal of a teacher and the termination of services of a teacher. The former relates to the "firing" of a teacher during a school year or contract period, pursuant to section 20-4-207, MCA; the latter refers to the nonrenewal of a contract following a school year (§§ 20-4-204, 20-4-206, MCA). The Court stated:

By its terms [section 20-4-207] applies to the situation where trustees seek to dismiss a teacher before the expiration of his employment contract, that is, during the course of a normal school year. The Trustees here did not attempt to dismiss Yanzick during the term of his employment contract. They chose not to renew his contract for a subsequent school year.

The Court then concluded that section 20-4-207, MCA, does not apply to the termination of tenured teachers. It went on to determine whether Yanzick was properly terminated.

In holding that the dismissal statute does not apply to the termination of tenured teachers, the Court implied that a tenured teacher enjoys the same "contract year" as a nontenured teacher. A tenured teacher is terminated following a contract year, not during the contract year. At least in that respect the Court made no distinction between tenured and nontenured teachers.

The converse of the reasoning in Yanzick is that a tenured teacher can only be dismissed during the contract year in accordance with section 20-4-207, MCA. It thus follows that a teacher hired (or rehired) in violation of the nepotism law cannot be dismissed during the contract year, as that section does not allow dismissal on that basis.

It might be argued that although a tenured teacher is rehired each year by the board, there is little, if any, discretion exercised by the board of trustees in the rehiring process, because those teachers can only be removed for good cause. It may be true that tenured teachers are not evaluated each year to determine their qualifications to the same extent as are newly-hired teachers. However, if a question of cause for termination arises, the purpose of the nepotism laws

again becomes apparent. The rehiring of the tenured teacher must then be considered on the basis of any allegations of cause for termination. The related board member will have the same opportunity to exercise bias that he/she would have in considering that teacher's initial hiring.

The nepotism laws cannot be circumvented by the related board member's abstention. Montana has long considered boards to act as a single unit; the action of a quorum of the board is an action of the entire board. See 37 Op. Att'y Gen. No. 6 (1977); 18 Op. Att'y Gen. No. 23 (1939).

The next question concerns the tenure laws' requirement that a tenured teacher not be terminated without good cause. Do the prohibitions of the nepotism laws constitute "good cause" within the meaning of tenure rights? Montana's tenure statutes do not express or define the valid causes for termination of a tenured teacher; in fact, the requirement of termination for "cause" is not mentioned. See §§ 20-4-203, 20-4-204, MCA. The Montana Supreme Court, however, has recognized a valuable property right in tenure status, and has stated that under constitutional substantive due process concerns the tenured teacher enjoys security in his job absent "good cause" for his termination. State v. District Court, Fergus County, 275 P.2d at 214; Yanzick, 641 P.2d at 440-41.

Generally, due process safeguards are not infringed when the action in question is not arbitrary or unreasonable. Matter of C.H., 41 St. Rptr. 997, 683 P.2d 931, 936 (1984). In accordance with this principle, the term "good cause" has been held to mean a substantial reason that affords a legal excuse, or a reason which is in good faith and is not arbitrary, frivolous, or irrelevant. Allen v. Lewis-Clark State College, 670 P.2d 854, 862-63 (Idaho 1983); School Committee of Forborough v. Koski, 391 N.E.2d 708, 709 (Mass. 1979).

In Hoagland, supra, the Montana Supreme Court observed that automatic reelection may not apply to a tenured teacher who becomes legally incapacitated by such reasons as "mental incompetence, loss of certificate to teach, loss of citizenship by conviction of crime or otherwise, the nepotism statute, or any other

circumstance or law disqualifying her for service." (Emphasis added.) Hoagland, 151 P.2d at 170.

The nepotism statutes afford a legal basis for termination. Their purpose is not arbitrary, frivolous, or irrelevant. Therefore, when the rehiring of a tenured teacher would conflict with the nepotism laws, the nepotism laws constitute good cause for not renewing the teacher's contract.

THEREFORE, IT IS MY OPINION:

1. The nepotism statutes, §§ 2-2-301 to 304, MCA, prohibit the rehiring of a tenured teacher where the teacher is within one of the prohibited relationships to a member of the school district board of trustees.
2. The 1985 amendments to the Human Rights Act and the Governmental Code of Fair Practices, §§ 49-2-303(3) and 49-3-201(5), MCA, overruled 39 Op. Att'y Gen. No. 67 (1982), insofar as it holds that the nepotism law does not apply to relationships by affinity.
3. 34 Op. Att'y Gen. No. 3 (1971) is overruled insofar as it is inconsistent with this opinion.

Very truly yours,

MIKE GREELY
Attorney General