

OPINIONS OF THE ATTORNEY GENERAL

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OPINION NO. 91

COUNTY OFFICERS AND EMPLOYEES - Nepotism statutes prohibiting a sheriff from appointing his son to the position of reserve deputy sheriff;

NEPOTISM - Nepotism statutes prohibiting a sheriff from appointing his son to the position of reserve deputy sheriff;

SHERIFFS - Nepotism statutes prohibiting a sheriff from appointing his son to the position of reserve deputy sheriff;

MONTANA CODE ANNOTATED - Sections 2-2-302, 2-2-304, 7-32-201(5), 7-32-202, 7-32-216, 46-1-201(8), 72-11-104.

HELD: The nepotism statutes prohibit a sheriff from appointing his son to the position of reserve deputy sheriff.

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24 June 1988

James Yellowtail
Big Horn County Attorney
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Dear Mr. Yellowtail:

You have requested my opinion on the following question:

Do the nepotism statutes prohibit a sheriff from appointing his son as a reserve deputy sheriff?

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.

Your specific question is whether a reserve deputy sheriff is a "position of trust or emolument." The nepotism statutes are penal. § 2-2-304, MCA. Therefore, they must be strictly construed. Montana Auto Association v. Greely, 38 St. Rptr. 1638, 632 P.2d 300, 306 (1981). Neither "trust" nor "emolument" is statutorily defined for the purpose of the nepotism laws. Moreover, my research has failed to uncover nepotism statutes in other jurisdictions with the same language. However, various sources provide appropriate meanings for these terms in the appropriate context.

"Emolument" generally means a pecuniary benefit such as salary, fees, or perquisites. Black's Law Dictionary 616 (rev. 4th ed. 1968); State ex rel. Amaya v. McBride, 539 P.2d 1006, 1012 (N.M. 1975); Spearman v. Williams, 415 P.2d 597, 600 (Okla. 1966). A reserve officer is a volunteer and is not entitled to compensation or pecuniary benefits. §§ 7-32-201(5), 7-32-202, MCA. The position is not a position of "emolument."

A "position of trust" is generally synonymous with public office or position. It implies performance of a duty for the benefit of the public and is thus also referred to as a "public trust." Black's Law Dictionary, supra, at 1234; State v. Monahan, 84 P. 130,

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133 (Kan. 1905); see 67 C.J.S. Officers § 3 (defining "public trust" as "every agency in which the public, reposing special confidence in the particular persons, appoints them for the performance of some duty or service.") The Montana Supreme Court has held that a public office is a public trust because it exists in the interest and for the benefit of the public. State v. Eaton, 114 Mont. 199, 133 P.2d 588, 591 (1943). The Court noted that the powers delegated to the officer are held in trust for the people and are to be exercised in their behalf. Id. at 591.

There is no question that the office of sheriff is a public trust according to the reasoning above. A reserve deputy sheriff is appointed to represent the office of the sheriff. § 7-32-201(5), MCA. He or she has some of the responsibilities and duties included in the office of the sheriff, such as being a peace officer, which entails maintaining public order and making arrests. §§ 7-32-201(5), 46-1-201(8), MCA. A reserve officer serves only in a supplementary capacity and under supervision of a full-time law enforcement officer. § 7-32-216, MCA. However, the limited nature of a reserve officer's authority does not diminish the import of his or her responsibilities in serving the public. In James v. Thompson, 392 So. 2d 1178, 1180 (Ala. 1981), the court held the office of supernumerary sheriff to be an office of trust. That position was similar to that of a reserve officer in that the position was legislative, was a supplemental office, and entailed duties that were contingent and narrowly defined.

I therefore conclude that a reserve deputy sheriff holds a "position of trust" within the meaning of section 2-2-302(1), MCA, and his or her appointment is subject to the nepotism statutes.

Section 2-2-302(1), MCA, prohibits the appointment of a relative connected by consanguinity within the fourth degree; therefore, a sheriff may not appoint his son, since they are related within the first degree. § 72-11-104, MCA.

My conclusion has no bearing on the effect of any actions taken by a "de facto" reserve deputy sheriff. The validity of actions of de facto officers has been addressed by the Montana Supreme Court in Wood v. Butorovich, 716 P.2d 608 (Mont. 1986).

THEREFORE, IT IS MY OPINION:

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The nepotism statutes prohibit a sheriff from appointing his son to the position of reserve deputy sheriff.

Very truly yours,

MIKE GREELY
Attorney General