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NEPOTISM: IT'S ALL RELATIVE

One of our most frequently received questions is: What does the State nepotism statute really say and what are all those "degrees" anyhow?

Let's go over the State nepotism statute and the various words it contains, as well as what we think the exception in it means for municipal employment.

To begin with, the word nepotism comes from the Latin word *nepos*, meaning either grandson or nephew. According to the American Heritage Dictionary, nepotism is:

Favoritism shown or patronage granted by persons in high office to relatives or close friends.

STATE LAW

Sections 10-1-10 and 10-1-11, New Mexico Statutes Annotated, 1978 compilation, read as follows:

10-1-10. Nepotism prohibited; exceptions. It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided that this act (10-1-10, 10-1-11 NMSA 1978) shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

10-1-11. Payment of nepotic employees; liability of employer and bondsmen; employment void. No person so unlawfully employed shall be paid or receive any compensation from public funds, and such employment shall be null and void, and the person or persons giving such employment, together with his or their bondsmen, shall be liable for any and all moneys so unlawfully paid out.

These two sections were enacted in 1925 and have remained unamended since that time. Note that the prohibition applies to any office created by statute or ordinance, whether elective or appointive. Although the statute clearly shows three exceptions to the prohibition (school teachers, persons earning less than \$600 a year, and persons whose employment is approved in advance by those who set the bond of the officer doing the appointing), there are actually several other factors which determine whether or not an appointment is or is not nepotism. We will discuss all of them.

PRIOR APPROVAL BY

THE BONDING AUTHORITY

According to the Municipal Code, § 3-10-2 (b), NMSA 1978:

For the care and disposition of municipal funds in the employee's custody and for the faithful discharge of the employee's duties, the governing body of the municipality shall require a corporate surety bond from the treasurer, the police officer and any other employee it designates. In lieu of individual corporate surety bonds, the governing body may secure a blanket corporate security bond. The municipality shall pay for the surety bond.

In addition, if an officer or employee required to take an oath and be bonded fails to take the oath and/or to supply bond within 10 days after certification of election or appointment, the office or job may be declared vacant by the governing body.

Basically, there are only three officers in a municipality who may employ people: the municipal judge, the mayor or, in a commission-manager municipality or a mayor-council-manager municipality, the manager. In the State or in a county, of

course, there are numerous elected officials who have hiring authority. Remember that the prohibition applies only to those officials and employees who can hire and so it is only their relatives who might be nepotic.

In the case of a municipality, where the governing body must approve the bond of such a hiring authority, a relative within the third degree of that official could be hired as a clerk, deputy or assistant if the hire were approved in advance by the governing body. Similarly, if the person were paid less than \$600 a year, the mayor, judge or manager would not need the governing body's advance approval.

It is only fair to say at this point that many municipalities forbid by ordinance the hiring of relatives of the manager or the mayor or the judge (and sometimes even relatives of members of the governing body) regardless of the degree of relationship. That prohibition exceeds the statutory requirement but may be politically smart. It is not unusual in most towns to hire a relative of a member of the governing body but Attorney General Opinion No. 82-8 says that the governing body member should abstain from voting on the appointment because it would be a conflict of interest. So there are two key points:

1. The prohibition applies only to relatives of persons who have authority to hire; and

2. Relatives of such persons may be appointed if the appointment is approved in advance by the governing body.

But there are two other factors to consider: how should we define "clerk, deputy or assistant" and what is meant by "within the third degree of consanguinity or affinity"?

CLERK, DEPUTY OR ASSISTANT

Just because you work for a public official, you may not be the official's clerk, deputy or assistant. It is fairly obvious that a sewer maintenance man is not a clerk or a deputy mayor, but is he an assistant? And what about a police officer? Is he a deputy because he has a commission from the mayor?

Fortunately, Attorney General Opinion No. 5448, dated 10/23/51, anticipated that problem and sought authoritative definitions from the legal source, *Corpus Juris Secundum*. Here are those definitions:

..."clerk" as a general term, has been defined as meaning one engaged in, or hired to do, clerical work such as bookkeeping, copying, transcribing, typing, writing, tabulation, etc., without special executive qualifications and without being in charge of work of special importance." 14 CJS 1205

..."deputy" means "one appointed as the substitute of another, and empowered to act for him in his name or on his behalf; one who is appointed, designated or deputed to act for another." 26 CJS 978

..."assistant" has been defined as meaning "one who helps, aids or assists; one who stands by and aids or helps another; also subordinate to one in an official position... But it has been held that the term implies a presumed absence of authority to use discretionary power in particular connections; the term has been held to include assistant accountants, and to exclude clerks and stenographers." 7 CJS 15

It must be pretty obvious by now that definition of words is one of the factors that supplies work for lawyers and judges, but in this statute the definitions are extremely important. Before we go on to the next set, make a mental note of a third point:

3. Only a very few jobs meet the strict definitions of "clerk, deputy or assistant" to the hiring official.

BLOOD AND MARRIAGE

Some might assume that blood suggests divorce more than marriage, but what the statute refers to is consanguinity or affinity. And that means more definitions, this time from *Black's Law Dictionary*, Fourth Edition:

Consanguinity means blood relationship, the connection of persons descended from the same stock or common ancestor. Lineal consanguinity is a direct line of descent, such as grandfather, father, son, grandson; collateral consanguinity is not direct descent, such as sister, aunt, niece, cousin.

Affinity is the tie between one spouse and the blood relations of the other. Under this concept, a husband and wife are each related to the blood relations of the other to the same degree.

So, as far as the statute is concerned, a mother-in-law has the same affinity relation to a person as her/his mother has consanguinity relation. Thus, blood and marriage both count in determining whether an appointment might be nepotism.

Since affinity recognizes the idea of a legal marriage, whether solemnized and licensed or merely common law, and since that concept includes a form of contract between the couple, it would be interesting to see if one could sustain a charge of nepotism based on appointment of a live-in lover or a mistress or relatives thereof. Apparently neither the Attorney General nor New Mexico courts have had to decide that matter.

A MATTER OF DEGREE

The statute pertains only to relatives by consanguinity or affinity "within the third degree". Since the law considers husband and wife to be "one" for purposes of determining relationship, you could say that a person's spouse is zero degree and the other degrees go on from there both directly and collaterally. You might think of relationships as a family circle with a person and spouse at the center and rings representing the other degrees of relationship spreading out from there. Those rings would include:

FIRST DEGREE: parents and children of the officer and spouse.

SECOND DEGREE: grandparents, grandchildren, brothers and sisters of the officer and spouse.

THIRD DEGREE: great-grandparents, great-grandchildren, aunts and uncles, nieces and nephews of the officer and spouse.

Anticipating a possible question, let us say that so-called "step" relatives such as step-mothers and step-children are affinity relations, and have the same degree of relationship as blood relatives for purposes of this prohibition, regardless of whether an actual adoption ever took place.

Great-great-grandparents, great-great-grandchildren, great-aunts and great-uncles, great-nieces and great-nephews are in the Fourth Degree of relationship and don't count under the statutory prohibition. Even more important, so are cousins; they don't count either, which makes it much easier for small town officials, who otherwise might not find any employees at all if cousins were prohibited from being hired. So there is a fourth point to remember:

4. Many relatives do not fall within the third degree of relationship and are not covered by the statute.

Let's remind ourselves once more of point number 2 - even a relative within the third degree of relationship may be hired if approved in advance by the officer, board or commission authorized to approve the appointing officer's bond. That is helpful sometimes in municipal or county hiring, but it does not amount to anything for many, many elected state offices because there is no one authorized to approve their bonds and, consequently, no one who can approve their hiring a close relative as a clerk, deputy or assistant.

OTHER CONSIDERATIONS

Although we have pretty well exhausted the nepotism prohibition under the general New Mexico statute, you may need to consider other prohibitions if you are dealing with some kinds of Federal funds. Many Federal grants carry specific prohibitions on hiring of relatives in jobs paid wholly or in part from Federal funds. Always read the conditions of the grant and consult the granting agency if there is any question at all.

Whether a person you are considering for hiring or promotion is a relative of the hiring official or not, you may have some local rule about the hiring of two or more close relatives in the same department or work unit or in supervisory relation to one another. There is no hard and fast principle that applies to all situations on all occasions as far as personnel management experts are concerned. Many times close relatives can work together with excellent efficiency, good morale and no indication of favoritism whatever; with other situations and people, there may be constant bickering, blatant favoritism, tale-bearing, rotten morale and internal dissension to the point of mutiny.

The wisest course is probably to adopt a policy that gives the municipality as many options for hiring and placement of qualified and capable employees as possible, but reserving the right to break up bad supervisory or operational combinations if they occur. Although that's probably easier said than done, it is something to try for.