

## Opinion No. 51-5448

October 23, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mr. Robert D. Castner State Auditor Santa Fe, New Mexico

{\*154} This is in reply to your letter of October 10, 1951, requesting an opinion of this office concerning the legality of the employment and payment of Robert G. Dwyre, son of State Highway Engineer Burton G. Dwyre, as a levelman in the State Highway Department.

Your inquiry as to legality was most particularly directed as to whether such payment and such employment would be in violation of our anti-nepotism statute, § 10-110, N.M.S.A., 1941 Comp. The pertinent provisions of our antinepotism law reads as follows:

"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 person 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 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."

You will note that in quoting the statute above I have underlined the words "clerk, deputy or assistant." {\*155} The specific naming of these three types or classes of employment by the Legislature in the Act make it necessary for me to conclude that other types or classes of employment not covered by these three words were intentionally excluded by the Legislature from the application of the act. The Latin maxim "expressio unius est exclusio alterius" is often used by the courts as an aid to construction of statutes. A literal interpretation of this maxim is that the mention of one thing implies the exclusion of another. Applying the maxim to the instant statute, we must inescapably find that the legislative intent in naming the positions of "clerk, deputy or assistant" meant thereby to exclude other types of employment. In order to determine whether or not the employment of a "levelman" by the Highway Department would come under the prohibited classification of "clerk, deputy, or assistant" we must decide whether those words are subject to construction.

Justice Brice, in the case of State v. Martinez, 48 N.M. 232, 149 Pac. 2d 124, 155 A.L. R. 811, stated:

"Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them."

Justice Bickley, in the case of Albuquerque Lumber Company v. Bureau of Revenue, New Mexico, et al, 42 N.M. 58, 75 Pac. 2d 334, said:

"It is a familiar rule of statutory construction in the absence of anything in the context to the contrary, common or popular words are to be understood in the popular sense."

An examination of the encyclopedias as to the meaning of the words "clerk, deputy or assistant" reveal that in the ordinary sense the word "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 or special importance." 14 C.J.S. 1205.

The word "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 C.J.S. 978.

The word "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 C.J.S. 15.

In my opinion, the position of "levelman" in the Highway Department is not such as could be included within the terminology of "clerk, deputy, or assistant" so as to be within that class of employment from which an officer is prohibited from naming any person related by consanguinity or affinity within the third degree. It is my opinion that Robert Dwyre's employment and payment for such employment was not prohibited by the anti-nepotism statute of this state.

I trust that this will answer your inquiry fully.