

Opinion No. 75-19

March 10, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Honorable Robert M. Doughty, II District Attorney 12th Judicial District P. O. Box 808 Alamogordo, New Mexico 88310

QUESTIONS

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1. Who is authorized to allow a county sheriff to give employment which would otherwise be prohibited by the nepotism statute -- Section 5-1-10, N.M.S.A., 1953.
2. Is the cook of the county jail a clerk, deputy or assistant as those terms are used in Section 5-1-10?

ANSWERS

1. The county commission.
2. The cook of the county jail is an assistant to the sheriff.

OPINION

{*65} ANALYSIS

1. Section 5-1-10 prohibits nepotism 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." Section 5 - 1 - 10, **supra**. It is the county commission's duty to approve the bond of the county sheriff; therefore, the commission has the power to approve or disapprove appointments made by the sheriff which would otherwise violate Section 5-1-10.

We have concluded that it is the county commission's duty to approve the sheriff's bond on the basis of two statutes -- Section 5-1-13B, N.M.S.A., 1953, and Section 5-2-12, N.M.S.A., 1953. While neither of these statutes uses the words, "approve the bond," they confer upon the county commission powers and duties which are tantamount to the duty to approve.

Sub-section 5-1-13B, N.M.S.A., 1953, requires bonds of each county officer and provides, "the amount of the bond required shall be fixed by the board of county commissioners . . ." The sub-section provides a formula by which the bond amounts are fixed for the various county officials including the sheriff. Section 5-2-12 charges the

county commissioners, "to examine and inquire into the sufficiency of all the official bonds given or to be given by any county or precinct officer as required by law . . ." Section 5-2-12, N.M.S.A., 1953. If the county determines that a bond is insufficient, Section 5-2-12 commands it to order the county sheriff "to show cause why he should not be required to give a new bond with sufficient security . . ." Section 5-2-12, **supra**. In the event that a county officer fails to supply a new bond as ordered, the county commission must certify that fact to the District Attorney and the District Judge. Section 5-2-12, **supra**. It then becomes the District Attorney's duty to institute proceedings to have the office declared vacant. Section 5-2-12, **supra**. The duties to fix the county sheriff's bond and to review it for sufficiency are equivalent to the duty to approve the bond. Sections 5-1-13B and 5-2-12 set forth in detail what the duty to approve entails.

{*66} The duty to approve the bonds of county sheriffs was formerly given to the District Judge by Section 15-40-4, N.M.S.A., 1953. The section was repealed by Laws 1967, Ch. 238, now compiled as Section 5-1-13, **supra**. Presently, the District Judge's only duty with respect to bonds of county officials is to preside over hearings to declare a county office vacant for the official's failure to post a bond approved by the county commission. Section 5-2-12, **supra**.

2. The sheriff has the duty to feed the prisoners in the county jail. No statute specifically charges him with that duty, but the several statutes pertaining to administration of the county jail reveal that intent. Section 15-43-14-1, N.M.S.A., 1953 (P.S.), for example, provides reimbursement and accounting procedures for expenses which the sheriff incurs in feeding prisoners and guards. This office has previously interpreted this section as expressing a legislative intent that the sheriff arrange for feeding prisoners and guards. AGO No. 65-44.

The sheriff employs a cook to help him perform his duty to feed guards and prisoners. An "assistant" is one who aids his employer to perform his official duties or who is an employee whose duties are to help his superiors. **In re Bernstein** 43 NY 2d 109, 266 Ap Div. 459, 292 NY 617 (1943); **Black's Law Dictionary**, 4th Ed; see also **Webster's International Dictionary, 2nd ed**. The cook of the county jail falls within these definitions of "assistant". Appointments of cooks for the county jail are, therefore, governed by Section 5-1-10.

By: Thomas Patrick Whelan

Assistant Attorney General