

Opinion No. 82-08

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OPINION OF: Jeff Bingaman, Attorney General

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PUBLIC OFFICERS AND EMPLOYEES; MUNICIPALITIES

In a municipality, Section 10-1-10 NMSA 1978, would deny employment to any person related within the prohibited degree to the "hiring authority", that is, to any of the members of the governing body whether or not the member votes on the question of approving the employment.

QUESTIONS

May the brother of a member of the governing body of a mayor-council municipality be employed as an assistant municipal clerk if the council member abstains from voting to approve his brother's employment?

CONCLUSIONS

Yes.

ANALYSIS

The employment of a relative by any public officer is generally governed by Section 10-1-10 NMSA 1978 which provides that:

"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."

OPINION

Thus, in order to constitute an illegal employment under Section 10-1-10, the following elements must be present:

- "1. a "person elected or appointed to any public office"
2. employs
3. as "a clerk, deputy or assistant,"
4. for compensation from public funds in excess of \$600 a year,
5. a person related within the third degree
6. without approval by whatever entity approves the bond of the public officer."

In this case, if it is determined that the prohibition against employment by "any person elected or appointed to any public office" applies to a member of a governing body who abstains from voting, all of these elements would be satisfied and the employment would not be permissible. In particular:

1. A member of the governing body of a municipality is an elected public officer. Section 3-10-1, NMSA 1978.
2. In the context of an anti-nepotism statute, the Supreme Court has construed the term "employ" to relate only to the "initial hiring."

{*283} **New Mexico State Board of Education v. Board of Education of Alamogordo Public School District**, 95 N.M 588, 592, 624 P.2d 530 (1981). Section 10-1-10 would not apply to a person employed prior to his relative's election to the hiring authority. Under the facts as presented, the employee in question was initially hired after his brother's election to the council.

3. An assistant clerk of a municipality would serve as a "clerk" to the governing body. **See**, Section 3-13-1, NMSA 1978; **Cf.**, Opinion of the Attorney General No. 57-201, dated August 14, 1957 [clerk in the office of the school district superintendent is not clerk to the school board].

4. City officers and employees are compensated² by the municipality. Section 3-12-3(A)(8), NMSA 1978.

5. Brothers are related within the second degree of consanguinity.

6. The governing body of a municipality is not bonded. Section 3-10-2, NMSA 1978; Opinion of the Attorney General No. 61-125, dated December 6, 1961. Accordingly, there is no authority which could approve an employment which would otherwise be prohibited by Section 10-1-10. **Cf.**, **State ex rel. Sanchez v. Stapleton**, 48 N.M. 463,

152 P.2d 877 (1944) (county commission approves bond of county assessor and could approve assessor's employment of his wife).

Anti-nepotism statutes, being penal in nature, are normally strictly construed. **Opinion of the Justices**, 291 Ala. 581, 285 So.2d 87 (1972). However, no statute may be construed so as to defeat the obvious intent of the legislature. **State ex rel. Newsome v. Alarid**, 90 N.M. 790, 568 P.2d 1236 (1977). Legislative intent is to be determined primarily from the language of an act. **Winston v. New Mexico State Police Board**, 80 N.M. 310, 454 P.2d 967 (1969). Section 10-1-10 is plainly intended to govern any public employment. The employment of municipal officers and employees is neither expressly nor implicitly excluded from the prohibitions of Section 10-1-10.

Nevertheless, it is not clear from the plain language of Section 10-1-10 whether a member of a governing body may exempt himself from Section 10-1-10 by abstention. This question would not arise, for example, under the New Mexico school district anti-nepotism law which clearly prohibits "the local school board" from employing certain relatives of "a member of such local school board." Section 22-5-6, NMSA 1978. Thus, under the school board statute, the vote of any board member is not a relevant factor.

Where the vote of a member of a governing body is intended to be determinative, an anti-nepotism statute is drafted specifically in terms of a prohibition against council or board members voting for a relative. For example, in **Pena v. Rio Grande City Consolidated Independent School District**, 616 S.W.2d 658 (Tx. 1981), the nepotism issue arose in the context of a Texas law which provided that no public officer "shall appoint, **or vote for**, or confirm the appointment to any office, position, clerkship, employment of duty of any person related . . ." within the prohibited degree. [Emphasis added.] See, also, **Commonwealth ex rel. Matthews v. Combs**, 426 S.W.2d 461 (Ct.App. Ky. 1968).

In a mayor-council municipality, the authority to hire certain municipal officers and employees is ultimately vested in its governing body. Pursuant to Section 3-11-5 NMSA 1978, the mayor recommends the appointment of municipal officers and employees for confirmation by the governing body. **Cf.**, Section 22-5-4(D) NMSA 1978 [School superintendent must recommend all persons employed by the school board]. There is no employment until approval has been given by the council. **Arellano v. {284} Lopez**, 81 N.M. 389, 467 P.2d 715 (1970). Moreover, Section 3-11-6 NMSA 1978 requires that such approval be given by "a majority of all the members of the governing body." Thus, the employment of municipal officers and employees requires affirmation by an absolute majority of the council regardless of how many members are present and voting.

Generally, where a member of the governing body of a municipality has disclosed ". . . possible interest in any issue coming before the governing body," he may disqualify himself from voting voluntarily or he may be required to disqualify himself by the remaining members. Section 3-10-5 NMSA 1978. This provision appears to be intended to allow the governing body of a municipality to take action on a matter even though one of its members may have a personal interest in the outcome.

The inherent ambiguity of Section 10-1-10 with respect to abstention may be resolved by resort to rules of statutory construction. See, e.g., **State v. Elliott**, 89 N.M. 756, 557 P.2d 1105 (1977). As a rule, statutes which relate to the same subject matter are in **pari materia** and should be construed to be consistent so far as possible. See, e.g., **New Mexico State Board of Education v. Alamogordo Public School District, supra**, 95 N.M. at 592. If Section 10-1-10, as it applies to employment by a municipal council, is construed consistently with Section 3-10-5, as it applies to a council member's interest in the employment of his brother, then such employment need not be prohibited if the member abstained from voting.

That is, where the hiring authority against whom the prohibition of Section 10-1-10 is imposed is the majority of a governing body rather than an individual, then so long as that majority, excluding the disqualified member, approves the employment, it should be allowed to do so. Consistent with Section 3-10-5, the majority of a governing body of a municipality should not be precluded from hiring a person because of the interest of one member of the governing body who does not participate in approving the employment.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General

[n*](#) If the employment is terminated before compensation equals \$600, there is no violation of Section 10-1-10.