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October 23, 1991

Don L. Roberts  
City Attorney  
City of Lewiston  
Post Office Box 617  
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Ref. No. 8241

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Roberts:

By letter dated September 30, 1991, you requested an opinion from this office regarding the legal consequences, if any, of a Lewiston City employee's spouse running for the Lewiston City Council. Lewiston's assistant city attorney, Earl McGeoghegan, is a classified city employee and has been employed by the City of Lewiston in this capacity for several years. Mr. McGeoghegan's wife, Shirley McGeoghegan, has filed a nominating petition and is a candidate seeking election to the Lewiston City Council. The election is scheduled for November 5, 1991. In light of Shirley McGeoghegan's candidacy, your question is whether Earl McGeoghegan could continue to serve as assistant city attorney if Shirley McGeoghegan is elected to the council. For the reasons set forth below, it is the opinion of this office that Mr. McGeoghegan could not continue to serve.

Idaho's Municipal Corporation law, Title 50, Idaho Code contains no provisions that would prohibit a city employee from being married to a member of that city's council. Idaho's anti-nepotism statute, Idaho Code § 18-1359(1)(e), does apply to city council members and the employment of close relatives. That

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provision would prohibit the appointment of a sitting council-member's spouse to a position with the city. However, this office has taken the position that existing public employment should not be jeopardized by the subsequent election of a relative to public office. A copy of the legal guideline setting forth this position is enclosed. From the facts set forth in your letter and the previous analysis provided by this office, it appears that Idaho Code § 18-1359(1)(e) should not prohibit Earl McGeoghegon from retaining his position with the city.

The next section requiring discussion is Idaho Code § 59-201. That provision states:

The members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

Although this office has limited facts relevant to Mr. McGeoghegon's employment relationship with the City of Lewiston, it is apparent that this relationship is contractual. Idaho case law recognizes employment relationships as contractual in nature and in certain instances will afford contract remedies to aggrieved employees even though a written employment contract has not been executed. Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).

Whether Idaho Code § 59-201 extends to employment contracts is not in doubt. Idaho Code § 59-201 has been cited and utilized by the Idaho Supreme Court on several occasions in cases that nullified employment relationships between boards and their officers. Nampa Highway District No. 1 v. Graves, 77 Idaho 381, 293 P.2d 269 (1956); McRoberts v. Hoar, 28 Idaho 163, 152 P. 1046 (1915); Nuckols v. Lyle, 8 Idaho 589, 70 P. 401 (1902); Ponting v. Isaman, 7 Idaho 581, 65 P. 434 (1901). The more difficult question is whether a public official's spouse can have an employment contract with the board on which the public official serves. When analyzed under Idaho's community property law, the answer must be "no."

The basic rule of law in Idaho is that all property acquired after marriage is presumed to be community property. Bolden v. Bolden, 118 Idaho 84, 794 P.2d 1140 (1990); Idaho Code § 32-906. Income earned by the employment of either spouse during marriage is community property. Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976). Further, each spouse has a vested interest as equal

partners in the community estate. Peterson v. Peterson, 35 Idaho 470, 207 P. 425 (1922); Hansen v. Blevins, 84 Idaho 49, 367 P.2d 758 (1962). Thus, under Idaho law, Shirley McGeoghegon has vested interest in one-half of the income earned by Earl McGeoghegon from the City of Lewiston. It follows that Shirley McGeoghegon has a pecuniary interest in Earl McGeoghegon's employment relationship with the city.

The only Idaho case to address this particular situation is Nuckols v. Lyle, supra. In Nuckols, the wife of a school board trustee entered into a contract to teach school with the district served by her husband. The contract was challenged by another member of the school board. In holding that the contract was void, the Idaho Supreme Court stated:

Touching the validity of said contract, only one question is necessary to be determined: Was the husband of Mrs. Young pecuniarily interested in the contract? We think he was. Under the laws of this state the earnings of the wife constitute a part of the community property. The husband has the control and management of the community property, and he may use it and is part owner in it, and hence is pecuniarily interested in it. The said contract was, by the terms of the said statute, null and void. We have other statutes prohibiting contracts of this kind. (See Rev. Stats. secs. 365-367.)

8 Idaho at 592. Although the court was relying primarily upon a statute expressly prohibiting school district trustees from being interested in school district contracts, the court made specific reference to R.S. § 365, a prior enactment of Idaho Code § 59-201, and indicated that the contract would be void under that provision as well.

Clark v. Utah Construction Company, 51 Idaho 587, 8 P.2d 454 (1932) is also relevant to the present matter. In Clark, the wife of an Owyhee County commissioner purchased a substantial amount of real property from the county. As the chairman of the board of county commissioners, the husband actually executed the deed conveying the property from the county to his wife. When challenged, the commissioner argued that the land was purchased with his wife's separate funds and, therefore, the land purchased was the separate property of his wife. The court rejected this argument and held that regardless of the nature of the property the commissioner was interested in the transaction.

The purport of the language used in these statutes is clear and unmistakable. A county commissioner is absolutely prohibited from being interested *directly or indirectly* in any sale of property belonging to the county. A violation of this statute by the officer is a felony. The general statutes merely reiterate the prohibition as to all officers. A sale of county property to the wife of one of the county commissioners contravenes the statutes above set forth, whether the purchase is paid with community funds or with the separate funds of the wife. The reason is obvious; in either event the commissioner is *interested*, within the purview of the law. Even if the purchase is made with separate funds, the law governing the marital relationship in this state imputes to the husband such an interest in the separate property of his wife, as to render the transaction obnoxious to the statute.

51 Idaho at 593 (emphasis in original).

Applying the above-stated law to the facts presented, it is clear that Shirley McGeoghegon, if elected to the Lewiston City Council, will have a pecuniary interest in Earl McGeoghegon's continued employment with the city. As a city council member, this interest would be prohibited by Idaho § 59-201. The fact that Mr. McGeoghegon is a classified employee and that the relationship existed prior to the election is of no real consequence. Earl McGeoghegon's employment contract and relationship with the City of Lewiston will undoubtedly be reviewed and renewed on a periodic basis. Shirley McGeoghegon's personal interest in this process cannot be reconciled with her official duties, particularly in establishing the annual city budget pursuant to Idaho Code § 50-1002. Furthermore, disclosure and non-participation in matters pertaining to Earl McGeoghegon's employment are not sufficient to overcome the prohibitions found in Idaho Code § 59-201. Ultimately, if Shirley McGeoghegon is elected and decides to take a position on the Lewiston City Council, Earl McGeoghegon's employment with the City of Lewiston would have to be terminated.

This conclusion is buttressed by strong policy considerations set forth by the Idaho Supreme Court. In McRoberts v. Hoar, supra, the court stated:

An official's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is

corrupting in its tendency. . . . There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by consideration of private benefit to himself.

The court stated further:

It is the relation that the law condemns and not the results. It might be that in this particular case public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

28 Idaho at 174-75. See also Nampa Highway District No. 1 v. Graves, supra.

The Idaho case law dealing with I.C. § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification. The case law is long-standing and the Idaho Legislature has found no reason to amend the statute.

The state of California has a nearly identical statute to I.C. § 59-201. Deering Codes, Government Code § 1090. The California Legislature has enacted a number of exclusions from this contract prohibition. Among these exclusions, the California legislature specifically excluded existing employment contracts of public official spouses. Deering Codes, Government Code § 1091.5 provides:

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(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(6) That of a spouse of any officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

The Idaho Legislature could take similar action, but until such action is taken, Earl McGeoghegan cannot be employed by the City of Lewiston while his wife serves on the city council.

Very truly yours,



FRANCIS P. WALKER  
Deputy Attorney General

FPW/ss

Enclosure

L-08241