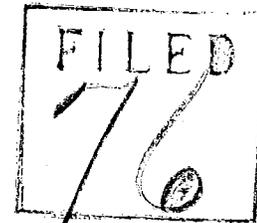


NEPOTISM:
OFFICERS APPROVING
APPOINTMENTS:

A member of the County Court voting for approval of his son-in-law as assistant county engineer violates the nepotism act; but if other members of the court vote for such approval without the connivance, understanding or agreement of the related member then the act is not violated.

January 23, 1941

Mr. Russell D. Roberts
Prosecuting Attorney
Adair County
Kirksville, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following request:

"Our local County Court asks the question, whether or not the County Engineer and Surveyor recently elected has the authority to appoint as an employee working under him the son-in-law of one of the County Judges.

"I am interested in knowing whether in your opinion the power of the County Engineer and County Surveyor is absolute enough to remove any question of nepotism in such an appointment."

Section 13 of Article XIV of the Constitution of Missouri, pertinent to nepotism, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have

the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In the case of State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100, l. c. 101, the Supreme Court of Missouri said that the nepotism act was adopted for the following reasons and purposes:

"(1) It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.

"(2) It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, designated therein section 13, art. 14,
* * * *"

And the court also states:

"* * * The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. * * * * If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. * * * *"

Section 8011, R. S. Mo. 1929, in so far as it applies to the question of appointing an assistant county engineer, provides as follows:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8008, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his

office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: * * * *"

It will be noted that the appointment of the assistant engineer is not complete until it is approved by the county court. In other words, the act of approval is a part and parcel of the appointment. We think this statement is supported by the rule announced in *Schulte v. City of Jefferson*, 273 S. W. 170, 1. c. 172 in the following language:

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; *Meachem's Public Office and Officers*, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84."

However, there might be an exception to the foregoing statement in a case where the members of the court who are not related to the appointee approve the appointment. In that case, if such members voting for the approval do not have an understanding with the related member that they vote for the approval, and if and provided further that they vote for the approval as their free official act and deed, and there is no conspiracy between them and the related member to so vote, then such appointee may be approved and the related member would not be guilty of a violation of the nepotism act. This rule is announced and applied by the Supreme Court of Missouri in *State ex rel. McKittrick v.*

Becker, et al., 81 S. W. (2d) 948, 951, where the court said:

"Now, in the instant proceeding, it is freely conceded that in the intended appointment there is not in fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose. The sum of the matter is that Judges Becker and McCullen are about, honestly and in good faith, to exercise their official power in securing for the Court of Appeals the continued and uninterrupted services of a commissioner whose record of integrity of character, untiring industry, and distinguished judicial service, has met with the unqualified approval alike of his associates on the Court of Appeals and the bench and bar of the state.

"In view of the foregoing considerations, we are of the opinion that the threatened action of the respondents is not beyond or in excess of their jurisdiction as members of the St. Louis Court of Appeals and is not in violation of section 13 of article 14 of our State Constitution."

CONCLUSION.

It is, therefore, the opinion of this department that the county engineer may appoint a son-in-law of one of the

county judges. We are further of the opinion that since it is the duty of the county court to approve such appointment then the member of the court related to the appointee would be violating the provisions of the nepotism act if he voted for the approval of the appointment. We are further of the opinion that if only the members of the county court not related to the appointee vote for the approval and if their voting is not by connivance or agreement or understanding with the related member that they so vote, then the related member would not be guilty of a violation of the nepotism act if such appointment is finally approved by the other members of the county court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP