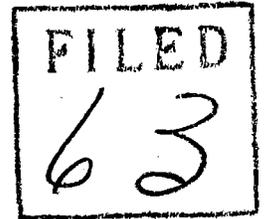


SHERIFFS:  
NEPOTISM:

The employment by a sheriff in a county of the third class of his wife to cook the meals for prisoners, for which the sheriff is reimbursed, violates Sec. 6, Art. VII, Constitution of Missouri.

November 19, 1946



Honorable M. E. Montgomery  
Prosecuting Attorney  
Scott County  
Benton, Missouri

Dear Sir:

We acknowledge receipt of your request for an official opinion of this department, reading as follows:

"The County Court of Scott County, Missouri requests your opinion in the following matter:

"In accordance with Sec. 4 of the legislative Act providing for the salary and compensation of Sheriffs of Counties of the third class, the Sheriff of this County submits his statement to the County Court on the last day of each month showing the actual cost of feeding persons under his custody in jail. On this statement he includes the item of 'Cook' \$100.00, for the person who does the cooking. It happens that the Sheriff, instead of employing domestic help outside of his family, uses his wife in that respect, and pays her \$100.00 per month, to cook for the prisoners.

"Is it all right for the County Court to reimburse the Sheriff for this expense item?

"Would such employment of the Sheriff's wife, by the Sheriff, as domestic help be contrary to the anti-nepotism law in effect?"

Section 4 of House Bill No. 899 of the 63rd General Assembly provides as follows:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his

custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

The "actual cost" of furnishing prisoners with wholesome food includes the cost of the food itself and the cost of having the food cooked, if the sheriff adopts this method of feeding the prisoners. He can, of course, purchase meals already cooked from someone and serve them to the prisoners.

In the case of Doty v. Sauk County, 93 Wis. 102, l.c. 103, the Supreme Court of Wisconsin said:

" \* \* \* This court has repeatedly held that the county is liable to the sheriff for whatever the proper board of persons confined in the county jail may actually cost, including the cost of the materials used for food and for preparing and serving the same, but without any allowance for the sheriff's personal services or for profits in his favor. \* \* \*"

The sheriff, therefore, is entitled to reimbursement for money he has expended in having food cooked for prisoners when he buys the food himself and has it cooked himself.

The question as to whether or not the sheriff of a third class county is entitled to reimbursement for payments he makes to his wife for cooking food for prisoners depends on whether or not such employment comes within the provisions of Section 6, Article VII, of the Constitution of Missouri. Said Section 6 of Article VII reads as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The sheriff names or appoints the cook in this case, not as an individual, but his authority for such naming or appointing is derived from the fact that he occupies the office of sheriff. It follows, then, that the sheriff names or appoints the cook "by virtue of his office."

It becomes necessary, then, for us to determine whether or not the cook employed by the sheriff in a county of the third class for the purpose of cooking meals for prisoners has been named to "public employment." The nepotism section of the Constitution covers the naming or appointing of those within the prohibited degrees of relationship both to public office and employment. Definitions of the word "public" as applied to "public officers" are applicable to a definition of the word "public" as applied to an employee. In 46 C. J., 921, par. 1, the law is thus declared:

"Offices have been classed as public or private in accordance with the nature of the duty or trust involved, every office being public, the duties of which concern the public. \* \* \*"

See, also, State v. Spaulding, 102 Iowa 639, 72 N.W. 288, where the court declares (N.W. 289):

" \* \* \* Every man is a public officer who hath any duty concerning the public and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and nature of that duty which makes him a public officer, and not the extent of his authority. \* \* \*"

In People v. Hayes, 7 How. Pr. (N.Y.) 248, the court approvingly quotes Best, Ch. J., in Henly v. Mayor of Lyme (5 Bing. 91):

"In my opinion every one who is appointed to discharge a public duty, and received compensation, in whatever shape, whether from the crown or otherwise, is a public officer."

Section 1 of House Bill No. 899 of the 63rd General Assembly provides that the sheriff shall be compensated by salary for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense.

In the present case, the payments made to the sheriff as reimbursement for his expenses for furnishing food to prisoners are paid by the county and are, therefore, paid out of public funds. The wife, in this case, is not paid out of compensation received by the sheriff, but is paid out of money paid to the sheriff to reimburse him for the actual expense. Therefore, the wife is not an employee of the husband, but is a public employee, as she is engaged in the performance of duties which are enjoined upon

the sheriff by law.

It is clear that the feeding of prisoners and the procuring of food for prisoners constitute part of the official duties of the sheriff. The fact that the sheriff, and not the county, is directly liable to the cook for payment for cooking such food does not prevent such cook from being a public employee.

The Supreme Court of Missouri, in the case of State ex inf. McKittrick v. Bode, 342 Mo. 162, 1.c. 166, said:

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualifications they "shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff." (R.S. 1889, secs. 8181 and 8182.)

\* \* \* \* \*

"It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the State, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be "a public charge or employment." (U.S. v. Maurice, 2 Brock, 96.) \* \* \*!" (Emphasis ours.)

The Springfield Court of Appeals, in the case of Scott and Morrison v. Endicott, 225 Mo. App. 426, 1.c. 427-428, said:

"There can be no doubt that a deputy sheriff appointed by the sheriff, as provided by section 11512, Revised Statutes 1929, is a public officer. (State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636.) That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark county. It is perhaps common practice in some counties for the sheriff to pay his deputies a specified amount,

but we are not herein concerned with the  
legality of such contracts. \* \* \*"

Since it is held by the courts that every public office is a public employment, the reasoning in the above cases leads us to the conclusion that a person need not be compensated directly by a county in order to be a public employee. The naming or appointing by the sheriff of his wife as the cook to prepare meals for prisoners in counties of the third class, then, is a violation of Section 6, Article VII, of the Constitution, since she is paid out of public funds for performing official duties which are by statute enjoined on the sheriff.

#### CONCLUSION

It is, therefore, the opinion of this department that the county court should not reimburse the sheriff in counties of the third class for moneys paid by said sheriff to his wife as a cook in preparing meals for prisoners.

It is further the opinion of this department that the naming or appointing by the sheriff of his wife as cook violates Section 6, Article VII, of the Constitution of Missouri.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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