

NEPOTISM:

Official, offending provisions of Section 13 of Article 14, unless he voluntarily resigns, must be removed by quo warranto; the fact that related appointee afterwards resigns does not prevent forfeiture of office under Section 13 of Article 14.

September 23, 1933.



Mr. T. J. Harper,
Prosecuting Attorney,
Galena, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The School Board in a certain district in our County is tied up on a proposition, so I am asking your opinion upon the following questions:

A School board member helps to employ a relative within the prohibited degree to act as treasurer for the district with compensation. Does this director automatically go out, or should he resign?

If this relative resigns can the board member continue to hold his office, or what effect would it have?

Thanking you in advance for an early reply, as they are tied up until your reply is received. Would like to hear this week if possible."

Section 13 of Article 14 of the Constitution of Missouri 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."

Section 7 of Article 15 of the Constitution of Missouri provides as follows:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town or township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the

removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Under Section 13 of Article 14 of the Constitution a director who names or appoints any person within the prohibited degree shall forfeit his office. Under Section 7, Article 14, the Legislature was authorized to provide for the removal of public officers. Section 1618 R. S. No. 1929, among other things, provides:

"In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; * * *."

By Section 13, Article 14 above, the Constitution declares that the appointment of any person within the prohibited degree shall cause a forfeiture of his office. That provision of the constitution meaning that the appointment of a person within the prohibited degree shall be cause for forfeiture of office, and when such fact is proven, it will result in a forfeiture of office. The Section does not mean that the person who is accused of violating the provision of the constitution shall not have an opportunity to be heard in a court of competent jurisdiction as to whether or not Section 13, Article 14 has in fact been violated. In *Merchants' Laclede Nat. Bank v. Schramm*, 190 S. W. 889, the court in considering the power of removing officers says at page 891:

"In this state the rules governing the removal of appointive officers have been discussed by the appellate courts in a series of cases in all of which, by the terms of implications of the statutory power given, the removal could only be for cause after notice and trial."

The right of a person to hold an office to which he has been elected is a right of which he cannot be deprived except by his day in court. In other words, the accused officer is entitled to notice and hearing before the right to hold office can be taken from him. While Section 13, Article 14 declares that an officer who names or appoints relatives in the prohibited degree shall forfeit his office, such constitutional provision does not mean that the accused official shall not have an opportunity to be heard in a court of competent jurisdiction as to whether or not, as a matter of fact, he is guilty of violating said Section.

Section 1618, R. S. No. 1929, referred to above, provides

that the right to hold office shall be tested by the writ of quo warranto. In such proceedings the accused official would be entitled to show that he did not name or appoint the relative or that the person appointed was not related within the prohibited degree.

Section 13, Article 14, does not make the office of the accused official vacant automatically, but under said Section the accused official is entitled to notice and hearing as to whether or not he is guilty of violating the mandates of said Section. Under the facts outlined in your inquiry the accused official should resign without putting the state to the expense of having him removed. If, however, the official refuses to relinquish the duties of his office, it will be necessary for you as Prosecuting Attorney to start proceedings for his removal.

It is therefore our opinion, in answer to this inquiry, that the accused official should resign and cause the district no further difficulty. However, upon his failure to so do, we believe it would be necessary to file an information in the nature of a quo warranto to declare his forfeiture of office.

Your next inquiry that if the relative should resign, can the Board member continue to hold office? Under Section 13, Article 14 above, any public officer "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." The injunction of the Constitution, therefore, is that no officer shall "name or appoint." It is the act of naming or appointing the relative which is a violation of the mandate of the Constitution, and when such naming or appointing takes place the constitution has been violated. It is the violation of the constitution that is the basis of the forfeiture of his office, and the cause or basis of forfeiture exists at the time of the naming and the appointing. At such time the officials' office could be forfeited by a proper proceeding. The constitution having been violated at the time of the naming and appointing of the relative and the cause of forfeiture coming into existence at that time, the relative could not restore the accused official to the emoluments of his office by afterwards resigning. The reason for this rule is obvious. If a relative appointed by such an official could receive the benefits of the office until such time as the violation of the constitution is discovered and then by resigning protect the offending official from the injunction of the constitution, it would make the constitutional provision a farce. Under such a theory the related teacher might even complete the term for which she was elected before the violation of the constitution was discovered, and yet, under such circumstances, the official could not be removed.

Therefore, in answer to your second inquiry, it is the

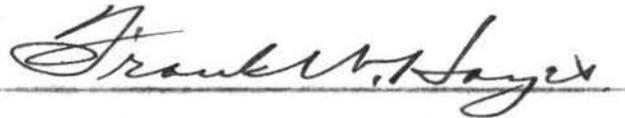
Mr. T. J. Harper,

-4-

September 23, 1933.

opinion of this Department that under Section 13 of Article 14 the director forfeits his office by naming and appointing the relative within the prohibited degree. After the naming and appointment, as prohibited by the constitution, nothing can be done by the related appointee to mitigate or change the offense already committed, and if the related appointee should afterwards resign, that fact cannot restore the director in good standing because the offense under the constitution was already complete without any action on the part of the related appointee.

Very truly yours,



Assistant Attorney General.

FWH:S

APPROVED:

Attorney General.