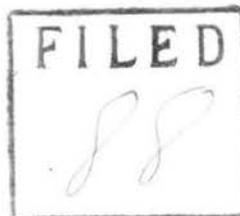


NEPOTISM: Road overseer may not appoint sons to employment--  
County Court may remove or removable by quo warranto.

May 26, 1933



Hon. Walter G. Stillwell  
Prosecuting Attorney  
Marion County  
Hannibal, Missouri

Dear Sir:

We wish to acknowledge your letter of April 26th, 1933,  
which is as follows:

"Several days ago a petition (the copy of which is hereto attached) was filed with the clerk of the County Court of this county. At a meeting of said Court, I was instructed to secure from your office an opinion on same. The questions being pertinent are:

1. Assuming the facts as mentioned in this petition to be true, has Richard Fry, road overseer of District One in Marion County, forfeited his right to hold office for violating the Anti-Nepotism provision of the constitution of the State of Missouri, the pertinent part of the Constitution being Section 13 of Article 14 and page 157.
2. If your answer to question one is in the affirmative and the question of the actual commission of these deeds is brought in issue, what is the proper procedure to follow in removing Fry from office.
3. Has the County Court, the body making the appointment, the right to determine the issues of the facts involved.
4. Assuming that Richard Fry did not directly appoint his sons but that said sons were appointed either by the County Court or the County High-way Engineer, would this be a violation of the Anti-Nepotism provision of the constitution.

The Court is anxious to have this opinion and I would

appreciate receiving your usual prompt attention."

You ask four distinct questions. The first one being based solely upon the facts shown in a copy of a petition, enclosed with your letter, filed before the county court of your county. The copy of petition plainly states that the road overseer did name and appoint two sons to render service to his district, while he the road overseer was acting in that capacity.

It is our opinion, reasons hereinafter discussed, that if the facts are true as stated in the petition, then the road overseer has forfeited his right to hold office for violating the constitutional provision Section 13 of Article 14, termed Nepotism provision.

Section 13 of Article 14 of the Constitution of Missouri is as follows:

"Any public officer or employee 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."

From the plain language of the above section it will be seen that necessary facts must exist before a person could be guilty of violation thereof.

The question arises as to whether or not a road overseer is a public officer or employee, and if he may name or appoint any person to render service to the State or to any political subdivision thereof, by virtue of his office or employment.

Section 7870 R. S. Mo. 1929, provides for the appointment of road overseers. And section 7872 R. S. Mo. 1929, provides for a bond to be executed by such overseers. Other sections of Chapter 42, Article 3, R. S. Mo. 1929, define the duties of overseers. In reading the statutory provisions relating to road overseers, the only conclusion logically deductible is that a road overseer is a public officer or employee of a political subdivision of the State and that such officer or employee by virtue of his employment must perform certain duties relative to the roads in his district. It must necessarily follow, although, not specifically provided for, that he would have the right to hire or appoint

persons to assist him in performing the duties imposed by said article and chapter supra.

In the case of State ex inf. Norman, Pres. Atty., v. Ellis, Circuit Clerk. Same v. Hall, Clerk of County Court of Stone County, 38 S. W. (2d) 363, the Sup. Ct. of Mo. In Banc, held that Section 13, Article 14 of the Constitution was self-executing. The Court in its opinion at page 365 said the following:

"The general rule is thus stated in 12 C. J. p. 729:

'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'

And Further, page 730:

'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will.'

And further from its opinion at page 366:

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates."

And further:

"Section 13 pronounces a forfeiture upon the commission of the act condemned. If anything

more is required, section 3, article 6, of the Constitution, invests the Supreme Court with power to issue writs of habeas corpus, mandamus, quo warranto, etc. There a method is provided in the Constitution for removal of an officer who has forfeited his office under section 13, and section 7 could not apply on any theory."

The court in this case also held that the prosecuting attorney has authority to institute quo warranto proceedings in the Supreme Court the same as the Attorney General.

Section 7870 R. S. No. 1929, among other things, provides that the road overseer shall be appointed by the county court at the February term of said court, and that his compensation is to be fixed by the county court annually in the month of March by order of record. There is nothing that provides the length of term that he shall serve.

The general rule of law as declared in 46 Corpus Juris, p. 964, with respect to an indefinite tenure, is as follows:

"Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power at times fixes a definite term, and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office." \* \* \*

We therefore hold to the conclusion that the county court has the right to appoint, and such appointee holds at the pleasure of the appointing power, unless otherwise contracted, and with the right to hire goes the right to remove.

If, therefore, a road overseer has clearly forfeited his right to hold office, then the county court by virtue of its right of appointment, (no definite term fixed for the office for such overseer) would have the power to determine the facts and remove said overseer. However, let us assume that the road overseer would not surrender his office after being requested or told by the county court that his services were at an end because of violating the nepotism provision, then what steps are necessary to oust him? In such a case quo warranto proceedings should be instituted to remove him.

May 26, 1933

You have authority under the statutes to institute such action.

From the above and foregoing we are of the opinion that your first question should be answered in the affirmative. In answer to your second and third questions, we are of the opinion that the county court has the right to remove such road overseer for cause, and if the overseer does not quit his employment, then quo warranto proceedings is the proper procedure for removal.

As to your fourth question: If such overseer directly appoints his sons then, of course, he violates the constitutional provision as set out supra. The converse of this would be true if he did not appoint his sons. However, the facts surrounding the employment of his sons should be closely scrutinized for if such overseer by collusion, scheme or plan had his sons appointed by others solely to evade the constitutional provision, then he is not acting in good faith and the acts of the county court or highway engineer would be in reality his act.

Yours very truly,

JAMES L. HORNOSTEL,  
Assistant Attorney General.

APPROVED \_\_\_\_\_  
Attorney General.

JLH:MM