

NEPOTISM: Under Section 8026, R. S. Mo. 1929, Mayor, City Council and Judges of the County Court elect Commissioners. If member of City Council participates in the election of relative within prohibited degree, such election would be illegal.

3-26  
March 23, 1934.



Mr. Omer H. Avery,  
Prosecuting Attorney,  
Troy, Missouri.

Dear Sir:

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

"The matter of nepotism entering in the appointment of a Commissioner of a Special Road District has come up in this county, and the County Court has requested that I obtain your opinion as to whether or not it applies in this case.

I refer you to Section 8026, R. S. Mo. 1929, providing for the appointment of said commissioners. It provides that the Mayor of any city or town and the members of the City Council, within any special road district, together with the members of the County Court shall appoint the Commissioners.

The situation we have is that the City Council and Mayor have recommended or voted for three Commissioners, one of which is to be selected. One man suggested is a brother of one of the City Council members, and another man suggested is a nephew of one of the members of the City Council. The third man suggested has only one vote of the City Council and, therefore, if he received the votes of the members of the County Court unanimously, he would still lack a majority vote.

The question has been raised as to whether the two men who have relatives on the City Council are disqualified by reason of said relationship. Both men are qualified and capable to act. I am personally of the opinion that they are not disqualified. I feel that in reality the appointment is made by the County Court, with the advice and suggestion of the Mayor and Council.

I think it would be a strained and unjustified construction of the Constitution to make it applicable in this case. However, the County Court desire the opinion of your Department before they act, and I trust you will favor me with an opinion before the first Monday in April, the next meeting date of the County Court."

Section 13 of Article XIV 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."

Under the foregoing section it is illegal to appoint to office a relative within the fourth degree. You apparently concede that position but are of the opinion that by reason of Section 8026, R. S. Mo. 1929, it would be proper for the representatives of the district to appoint relatives of members of the City Council. Section 8026, R. S. Mo. 1929, provides as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the

county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

Under the foregoing section the mayor and members of the city council, along with the Judges of the county court, comprise the committee or board which represents the district in the selection of commissioners. Under the terms of the statute the mayor and members of the city council have as much voice in the selection of the commissioners as do the judges of the county court. The Supreme Court, in construing this section in *State ex inf. Holt v. Meyer*, 12 S. W. (2d) 489, 490, says as follows:

"Relator assumes the mayor and councilmen act as officers of the city in appointing commissioners. As stated, the mayor and members of the council and members of the county court do not participate in the meeting as officers of either the city or county, but as representatives of the whole district, for the sole purpose of appointing commissioners.

The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. No doubt the lawmakers assumed the members of the meeting would be so interested in the welfare of the district that they would not permit rivalry between the county court and the city council to interfere with the honest performance

of their duty. Each member of the meeting is authorized to participate in the appointment, and, absent a word in the statute to the contrary, we must hold each member of the meeting to have a vote."

Under the foregoing decision, each member of the city council has a vote and, along with the mayor, has just as important a part in the appointment of the commissioners as does the county court. It is true that the section further provides that the mayor and city council may make a written certificate of their choice, where the city is located a greater distance than ten miles from the meeting place of the county court, but in the above decision, at page 491, it is said that: "The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present."

We therefore conclude that the fact that they may vote by certificate does not in the least take away their right to name or appoint. It is the act of naming and appointing a relative that is illegal and the relative so elected cannot demand the fulfillment of the appointment. We conclude, therefore, that a person who is related within the prohibited degree to members of the city council cannot be legally appointed or elected as commissioner of this road district. That a road district is a political subdivision of the State is a matter that cannot be controverted. A commissioner elected to serve the district is rendering service to a political subdivision, within the prohibition of the Constitution, and if such commissioner is related to a member of the city council who participated in his election and appointment, then we believe that such election is illegal.

It is therefore the opinion of this Department that under Section 8036, and the above decision, the mayor and members of the city council are just as much a part of the appointing power and have the same right to name the commissioner as do the Judges of the County Court, and that a person related within the prohibited degree to members of the city council would be illegally elected or appointed.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

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