

NEPOTISM:-Teacher's contract becomes illegal only where related director participates in teacher's election, or where there was collusion or fraud.

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April 16, 1934.



Mr. J. B. Dearmont,
Prosecuting Attorney,
Mound City, Missouri.

Dear Sir:

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

"We have a school board that has employed a teacher that is related to one member of the board in the prohibited degree. The related director was opposed to the employment and went on record as opposing the employment. The Board consulted me about the matter before then employed. I told them as I interpreted your opinion of August 25, 1933 to Hon. Orin J. Adams, the only way to bring about the employment would be for the related director to resign before the employment was made. This he refused to do. I further told the two directors, that as I interpreted your opinion, that an employment by them in defiance of the related director could not forfeit his position on the board, but that it would be an illegal and void contract on their part and endanger the payment of the teacher out of the school funds of the district, if contested. This same teacher was employed last year with this same related member on the board, but the matter was not raised at that time, nor did the fact that she was related to this member enter into the employment at that time.

1. Am I right in my interpretation of your former opinion?
2. Can this employment be reached in the manner made?
3. If not, would you advise contesting payment, out of the school funds, of the teacher's salary?

There is no collusion in this employment.

The related director has no children of school age. All patrons that have children attending school seem to be behind this employment. I think that there is a feeling on the part of the related director and the patrons that are behind him that they are paying the teacher more than they should. They would be disposed to contest payment under this employment."

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."

The Supreme Court in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, 101, in construing the above constitutional provision, says as follows:

"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. Of course, a board acts through its official members, or a majority thereof. 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. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

As we construe the above constitutional provision and the decision in the Whittle case, it is the act of the related director in exercising his power to vote or appoint in favor of the related teacher that causes the forfeiture of office and makes the contract illegal. Where the related director does not participate by casting a vote or otherwise in the election of the teacher, such election is legal. Of course, if the related director brings about the election of the teacher through a fraudulent or collusive agreement, then, as a matter of law, we believe that the election would be illegal.

We do not believe that you correctly interpreted the opinion of this Department under date of August 25, 1933, directed to Hon. Orin J. Adams, Kingston, Missouri, and written by Hon. Harry G. Waltner, Jr., Assistant Attorney General. We quote from Mr. Waltner's opinion in order that you may find the views expressed in that opinion and the views expressed herein are entirely consistent. Mr. Waltner says as follows:

"From an examination of this Section it is evident that the members who are not related to the teacher employed would not offend against this provision by voting for the employment of a teacher who is related within the prohibited degree to another member of the board. In other words, the only one violating the provision is the related director. As to the effect on the member of the board not voting, and who is related within the prohibitive degree to the teacher employed, we think this question should be determined upon the ground of the good faith of the related director not voting for the employment of the teacher related to him in the prohibited degree. It does not seem logical or just that two or more members of the board having the power to employ a teacher could employ such teacher against the wishes of the other member when such teacher was related to the latter member within the prohibited degree, and by the acts of the other members of the board, in nowise brought about by the related member, subject the latter member to forfeiture of office. On the other hand, we are firmly of the opinion that if teachers are employed by a school board who are related to any member or members of the board, and the employment of such teacher is obtained by any collusion, understanding, agreement, or in any other manner involving the related director or directors, that the office of such director or directors is forfeited whether or not he or they vote for or against such employment, or even though he or they be not present at the meeting when such is appointed. This is consistent with the liberal construction given the amendment, and we believe was in the mind of the court when it stated in the Whittle opinion supra, 'either by casting a deciding vote or otherwise.' Accordingly, in the event a relative of a member of the board within the prohibited degree is employed as a school

teacher or other employe, the transaction should be scrutinized and searched with extreme energy and carefulness, and if there is a semblance of collusion or bad faith on the part of the related director in the employment, the member so related to the employed teacher should be ousted."

Mr. Waltner further held that:

"Accordingly, it is the opinion of this office that any contract entered into by the School Board and an employe, which works a forfeiture of office under Section 13 of Article XIV of the Constitution is a contract made 'in the teeth of the law' and is void and unenforcible."

Concurring on what Mr. Waltner held, we believe that it is only the member who participates in the election of the related teacher that performs an illegal act and lays himself liable to forfeiture of office. If the teacher related to one member is elected by the other members of the board, and the related director does not participate, either by casting a vote for such relative or by collusion or fraud, then the contract entered into between the teacher and the board is legal. It is only where the contract results from the related director participating in the election that the contract is void and cannot be enforced by the teacher, and it is only when the related director participates in the election that the related director can be made to forfeit his office. The other members of the board cannot, by voting for a teacher related to one member, cause the related director to forfeit his office, nor will the fact that the non-related members, in good faith, elect a member related to a member of the board, make them liable where the related director does not participate in the election of such relative.

You state in your letter that there is no collusion between the related director and the other members of the board, and that the related director, in good faith, opposed the employment of his relative and went on record as voting against him.

Upon the facts stated in your letter, it is therefore the opinion of this Department; (1) that the election of the teacher was legal and that the contract entered into between him and the board is legal and enforcible; (2) that the other members of the board would not be personally liable for warrants issued to the teacher upon this legal contract; (3) that the related director would not forfeit his office; and (4) that there would be no reason for contesting the payment of this teacher's salary which is due him under a legal and enforcible

Mr. J. B. Dearmont,

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contract.

Very truly yours,

FRANK W. HAYES,
Assistant Attorney General.

APPROVED:

Attorney General.

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