

(SCHOOLS - CONSOLIDATED SCHOOL DISTRICTS - APPOINTMENT OR EMPLOYMENT BY SCHOOL BOARD OF ONE OF ITS MEMBERS TO OFFICE OR EMPLOYMENT OF PROFIT - NEPOTISM - RIGHT OF CITIZEN TO INFORMATION OF AFFAIRS OF BOARD AND DISTRICT)

2-8
February the Seventh,
1934.



Mr. F. W. Dumard,
6200 Lotus Avenue,
Wellston, St. Louis County, Mo.

Mr. John L. Pardue,
6205 Lenox Avenue,
Wellston, St. Louis County, Mo.

Gentlemen:

A request for an opinion has been received from you under date of November 14, 1933, such request being as follows:

"As per your instructions during our recent conversation, we submit the following:

Wellston, Mo. - Unincorporated - Population around 10,000. Has a Consolidated School District, with a Board of six Directors.

Wellston School Board's records, examined while in the St. Louis County Prosecuting Attorney's Office show that -

(1) Henry W. Briemeyer, while a member of said board, received a salary of \$125.00 per month as Secretary to the Superintendent of Schools in addition to the \$150.00 per year received as Secretary to the School Board.

(a) Does this amount to wrongful distribution of school funds?

(b) If so, what is the penalty and whose duty is it to prosecute?

(c) What legal procedure is necessary in order for the school district to be reimbursed for the amount of the school funds wrongfully disbursed?

(d) When school funds have been wrongfully disbursed over a period of years, for how many years will board members be liable in a suit to recover such funds?

(e) For how long, after his resignation, is an ex-board member criminally liable for wrongful distribution of school funds?

(f) Does not section 9360 (R.S. 1929) prohibit the paying of salaries, beyond the amount stated in said section, to School Board Members of the Wellston Consolidated District, even though Wellston is not incorporated?

(g) Can a resigned School Board Member be appointed by the Board to a salaried position as Superintendent of Build-

ings or Business Manager for the Board or to some similar position and legally hold that salaried position? If not how can he be removed?

(2) John W. Hill, a member of the Wellston School Board, has a stepfather employed at a salary by said board. Mr. Hill claims that he did not vote when the Board appointed his relative.

(a) Can Mr. Hill be removed from office by action under the Anti-Nepotism Amendment?

(b) Should the County Prosecuting Attorney refuse to take action what other recourse is available?

(3) In addition to the above, the Wellston School Board persistently refuses to publish a DETAILED financial statement of all receipts of school moneys, when and from what source derived and of all receipts on what account etc. either in the paper published in our district or to post same in five public places in our district, but they publish a very condensed and general statement in a paper published in another part of the county.

(a) Is not this a direct violation of section 9360 and are not the Board Members guilty of a misdemeanor and punishable by a fine?

(4) Suppose a School Board employed a person at a stipulated salary or made donations to an organization, neither of which acts were specifically provided for in the Missouri Statutes, would such money paid out as salary and donation of school funds, amount to a wrongful distribution of school funds?

(5) Has a tax paying citizen of the Wellston School District the right to look at the records of the Board and must the Secretary and Treasurer of said Board give to said citizen information regarding the title of any particular employe of the said Board and the amount of salary paid to said employe?

(a) If this information is refused what recourse has the taxpaying citizen?

Your consideration of the above facts and your answers to the above questions will not only be appreciated by the undersigned but, we feel sure, by every law abiding citizen of Wellston."

According to a conference with you in connection with this request, it is our understanding that you have withdrawn and desire us to disregard questions (1-g) and (4), and consequently we shall eliminate these two questions from further consideration.

As to question (1), R.S. No. 1929, Section 9360 provides, in part, as follows:

"No member of any public school board of any city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year."

and under the facts furnished by you a member of the Public School Board did hold an office or employment of profit from said Board. The fact that such office or employment was as Secretary to the Superintendent of Schools, and not as a direct employe of the Board, would not seem to make any difference, in view of R. S. Mo. 1929, Section 9329 which provides, in defining the powers of school boards of city, town and consolidated schools, that "no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor", so that the Board itself would have authority and power over the employment as Secretary to the Superintendent of Schools.

It is our opinion that your question (1-a) is to be answered in the affirmative.

As to question (1-b), R. S. Mo. 1929, Section 9232 provides in part as follows:

"Any * * * * school director or other officer, who shall willfully neglect or refuse to perform any duty or duties pertaining to his office under this chapter, shall be regarded as guilty of a misdemeanor and subject to a fine of not more than one hundred dollars, to be recovered in any court of law in this state having competent jurisdiction."

Insufficient facts are given to show if the neglect or refusal was willful within this statute or if the acts complained of were willful, corrupt or fraudulent so as to bring them within R. S. Mo. 1929, Sec. 4090 or 4091, and on this point we express no opinion.

However, if in fact the acts could be established to be within either of these statutes, R. S. Mo. 1929, Section 11316 provides, in part, as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county."

As to question (1-c), if money has been disbursed without statutory authority so that the person who has received it is under a legal obligation to return it, as has been dealt with under (1-a) supra, and if the money did belong to and should be recovered by the School Board, the School Board would be the proper entity to institute suit against such person for its recovery, and

if the School Board, after formal demand by an interested citizen or taxpayer, refuses or fails within a reasonable time to bring such suit to collect the debt due to it, such citizen could institute suit in the name of the state, at the relation of the citizen or citizens against the School Board by way of mandamus to compel the School Board to proceed to collect such debt, State--
ex rel Wear v. Francis, 95 Mo. 44 (1888), wherein the court said:

"* * * where a public right is involved, and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any legal or special interest in the result, the fact that he is a citizen, and, as such, interested in the execution of the laws is the sesame which unlocks the gates of mandatory authority whenever an officer whose functions are merely ministerial, refuses to perform his office and thereby causes detriment to the public interest." (Page 48)

As to question (1-d), R. S. Mo. 1929, Section 863, in defining the statute of limitations as to personal actions, provides as follows:

"Within three years: First, an action against a sheriff, coroner or other officers upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

As to question (1-e), R. S. Mo. 1929, Section 3393 provides as follows:

"No person shall be prosecuted, tried or punished for any offense, other than felony, or for any fine or forfeiture, unless the indictment be found or prosecution be instituted within one year after the commission of the offense, or incurring the fine or forfeiture."

If the prosecution were to be for a misdemeanor under Section 9232, Sec. 3393 would govern. If the prosecution were to be for a felony under Sec. 4090 or 4091, the limitation would be three years, R. S. Mo. 1929, Sec. 3392.

As to question (1-f), although the part of Section 9360 quoted under (1-a), supra, deals with public school boards of cities, towns and villages, this would not prevent its application to the Wellston School Board, because R. S. Mo. 1929, Section 9333, dealing with consolidated school districts, provides, in part, as follows:

"The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state."

and in the absence of any specific statute comparable to Section 9360, dealing with consolidated school districts, the provisions of Section 9360 would apply.

As to paragraph (2), the Constitution of Missouri, Article XIV, Section 13, provides as follows:

"NEPOTISM, BY ANY OFFICER OR EMPLOYE, FORBIDDEN - FORFEITS OFFICE. 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."

and it was held in the case of *Norman v. Ellis*, 325 Mo. 154, 28 S.W. (2d) 363 (1930), as to affinity, as follows:

"Affinity is defined as a legal relationship which arises as the result of marriage * * * 'between each spouse and the consanguinal relatives of the other.'" (P. 162)

and it was further held, as to the necessity of legislation for the enforcement of this constitutional provision, as follows:

"A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will." (P. 160)

Likewise, in the case of *State v. Bowman*, 184 Mo. App. 549, 170 S.W. 700 (1914), the issue was presented as to the right of a member of a public body to be appointed by such body to an office over which such body had a power of appointment, and the court held that such an appointment would be against public policy. The court said:

"* * * we have no hesitancy in holding that it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office." (Pages 556, 557)

The court further, at page 559, referred to the Constitution of Missouri, and said:

"Section 18 of article 9, of our Constitution, provides that: 'No person shall at the same time fill two municipal offices either in the same or different municipalities.' * * * If this constitutional provision does not absolutely prohibit our granting the relief prayed for, it certainly indicates the public policy of this State on the question we are now discussing." (Page 559)

Thus, as to your question (2-a), the answer is that the constitutional provision is self-enforcing, and as to (2-b), a suit in quo warranto could be instituted for ousting from office any person violating the anti-nepotism provision of the Constitution.

As to question (3), the Attorney General ruled in an opinion rendered to George W. Kriegesman, President, St. Louis County Press Association, 104 West Lockwood Avenue, Webster Groves, Missouri, that that part of Section 9360 of the 1929 Statutes which has not yet been quoted above, which deals with the publication of statements by school boards, and is as follows, " * * * and provided further, that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all school purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City." means what it says. A violation of this part of Section 9360 could be prosecuted in the same manner as discussed in (1-b) supra, this being a misdemeanor punishable "by a fine not to exceed one hundred dollars."

As to question (5), the right of taxpayers and citizens to information regarding the affairs of the School Board and District is covered by that part of Section 9360 quoted under (3) supra, and for a failure to give out the information required by Section 9360 to be given out, the procedure for a remedy therefrom is treated under (3) above.

Mandamus would also lie. See (1-c) supra.

Respectfully,

Edward H. Miller
ASSISTANT ATTORNEY GENERAL.

Approved:

ATTORNEY GENERAL.

KEM/MC.