

NEPOTISM: Sec. 13, Art. XIV, Mo. Constitution does not apply to appointment of one's self;

Employment of one's self by school director to transport own children to school does not forfeit office and money received therefor is not embezzlement under provisions of Sec. 4091 R.S. 1929; prosecution under Sec. 4090, R.S. 1929.

March 1, 1934.

35



Hon. James H. Russell, Jr.,
Chilhowee, Missouri.

Dear Senator:

This department acknowledges receipt of your letter of some time ago, relative to a school problem in Chilhowee, which reads as follows:

"1. Earl B. Coe is now and has been for a number of years a member of the Board of Education of C.D. #2, Chilhowee, Mo.

The Board of Education during this time has employed Mr. Coe to transport his own children from his home to school, paying him from school funds by warrant, several hundred dollars for this service.

Question No. 1. Just what degree of relationship does Mr. Coe bear to himself so far as section 13, article 14 of the Constitution applies to the case? In other words, could Mr. Coe vote to employ himself to render service to the district and not forfeit his office by so doing, but should he vote to employ his fourth cousin he would forfeit his office?

Question No. 2. Is such employment as noted above a violation of section 9360, R.S. Mo. 1929? If so, does such violation carry with it forfeiture of office?

Question No. 3. If such employment was a violation of the law, was the expenditure of the school to pay for such hire a misuse and a diversion of school funds? I refer you in particular to Sections 4090 and 4091, R.S. Mo. 1929."

Question No. 1. Section 13 of Article XIV, being what is commonly termed the "nepotism section", 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."

As stated to you verbally, school directors are public officers; the nepotism section therefore applies to school boards. As to the relationship Mr. Coe bears to himself so far as the nepotism section is concerned, we are of the opinion that this section deals solely with the question of a person having the appointive power appointing another person related to him within the fourth degree, and has no application to the appointment of the person himself. It is therefore, the opinion of this department that said section does not apply in the instant case.

If Mr. Coe employs himself, he would be violating Section 9360, R.S. Mo. 1929, the pertinent part of which is 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; *****"

The contract of his employment would be void and an action to recover the money so paid him would lie. As to whether or not he would forfeit his office in the event he voted to employ his fourth cousin, this department has held in a recent opinion (copy of which is enclosed herewith) that fourth cousins are not within the degree prohibited by the nepotism section of the Constitution of Missouri.

Question No. 2. The section referred to in your second question, i.e., Sec. 9360, the pertinent part of which is quoted

you in Question No. 1, does not state that the member of the board, if he violate the provisions of said section, is subject to ouster. We therefore conclude that it does not carry a forfeiture of the office. The result of such a violation will be taken up in our discussion of Question No. 3 hereof.

Question No. 3. Section 4090, R.S. Mo. 1929 provides as follows:

"Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district, or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

Under this section you will note that if any officer of the school district willfully or corruptly votes for, assents to, or reports in favor of, or allows or certifies for allowance any claim or demand against the district of which he is a member of the board, he is subject to prosecution.

We are of the opinion that Section 4091, R.S. Mo. 1929 is not applicable to the case under discussion, as it could not be considered that Mr. Coe, in receiving the money from the board of which he is a member, has embezzled the same.

The Supreme Court of Missouri in the case of State v. Douglass, 239 Mo. 674, makes the following pertinent comment (l.c. 680-681):

"There are a great many felonies which may be committed by public officers besides bribery and embezzlement, to-wit, receiving benefits from the deposit of public funds, Secs. 4558 and 4559, R.S. 1909; corruptly allowing and auditing claims, Sec. 4560, R.S. 1909; unlawful disbursement of public moneys, Sec. 4561, R.S. 1909; failing to pay over excess fees collected, Sec. 4563, R.S. 1909. It would therefore have been well nigh impossible for the General Assembly to have recited all these crimes in the Statute of Limitations, and in using the broad words 'corruption in office', they found a comprehensive phrase intended to cover every class of crimes which amounts to a felony when intentionally committed by a ministerial or judicial officer."

It is therefore, the opinion of this department that if Mr. Coe has willfully or corruptly voted for his own employment and for the compensation incident thereto, he would be subject to prosecution under Section 4090 R.S. Mo. 1929.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY MCKITTRICK,
Attorney General

OWN:AH