

NEPOTISM:

Member of Board of Aldermen may not pass upon the appointment of his brother as City Attorney without violating Section 13, Article XIV. of Missouri Constitution.

Member of Board of Aldermen who also holds the office of City Clerk does not forfeit both offices by passing upon the appointment of brother in his capacity as Member of Board of Aldermen.

----- October 26, 1934.
Both appointor and appointee forfeit office under the Nepotism law.

The Nepotism Law of Const. of Mo. applies to Cities of Fourth Class.

Honorable John W. Terrill
State Representative
Maries County
Odd Fellow Building
Belle, Missouri.

Dear Sir:

This department is in receipt of your letter of recent date wherein you state in part as follows:

"In the City of Belle, Missouri, which is a city of the fourth class, there is a certain person who is a member of the Board of Aldermen and city clerk. His brother was appointed city attorney by the Mayor and this appointment was passed upon by the Board.

"I would like to have a ruling from you in regard to this as to whether or not the Anti nepotism laws of the State prohibit both men to serve in their respective positions. And as to whether this law applies to cities of the fourth class."

Your request is divisible into the following questions:

- (1) May a member of the Board of Aldermen pass upon the appointment of his brother as City Attorney without violating Section 13 of Article XIV of Missouri Constitution?



- (2) If a member of the Board of Aldermen also holds the office of City Clerk, does he forfeit both offices by passing upon the appointment of his brother in his capacity as a member of the Board of Aldermen?
- (3) Does only the member of the Board of Aldermen, as appointor, lose his office or does it also include the office of the appointee?
- (4) Does Section 13, of Article XIV. of the Constitution of Missouri apply to Cities of the Fourth Class?

- 1. - - -

May a Member of the Board of Aldermen
pass upon the appointment of his brother
as City Attorney without violating Section
13 of Article XIV of Missouri Constitution?

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 constitutional provision, a member of the Board of Aldermen, who exercises his right to name or appoint his brother as City Attorney, would forfeit his office as a Member of the Board of Aldermen. You do not state whether or not the member of the Board of Aldermen participated in the election of his brother as City Attorney. If he did not vote for the City Attorney and the latter was elected by the votes of other members of the Board, then the member of the Board of Aldermen has not violated the above constitutional provision. However, if he did exercise his right to vote in favor of his brother as City Attorney, then he has violated the provision of the Constitution.

In State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, the Supreme Court passed upon Section 13, of Article XIV. of the Constitution of Missouri, the Court says at page 101:

***** The amendment is directed against officials who shall have (at the time of the selection) 'the right to 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 State v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154, provides:

"Section 13 provides that any official violating its provision ' **** shall thereby forfeit his **** office employment'.

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477."

A brother is related within the fourth degree, and

therefore, we are of the opinion that if a member of the Board of Aldermen exercised his right to name his brother as City Attorney, he has forfeited his office. We are further of the opinion that he would also forfeit his office if he was silent and refused to vote for it would be deemed to be with the majority. If, however, the board member did not vote for his brother and as a matter of fact voted against him, then, absent fraud and collusion, he would not forfeit his office. To hold otherwise would make it possible for the other members of the Board to name the relative of an unfavored member of the Board and thereby cause him, over his objection and protest to forfeit his office, and we do not believe that this was the intention of the constitutional provision.

II.

If a member of the Board of Aldermen
also holds the office of City Clerk,
does he forfeit both offices by passing
upon the appointment of his brother in
his capacity as a member of the Board
of Aldermen?

Section 13 of Article XIV. of the Constitution of Missouri, supra, provides that "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, ****"

The above constitutional provision makes the office forfeited when "by virtue of his office or employment", a public officer or employe of this State or of any political subdivision thereof has a right to name or appoint a person within the prohibited degree. By virtue of his office, as City Clerk, the Board Member would have no right to name, appoint, or cast a deciding vote in favor of his brother as City Clerk, and we are therefore of the opinion that the board member would not come within the constitutional provision as to forfeiture of his office as City Clerk.

III.

Does only the member of the Board
of Aldermen, as appointer, lose
his office or does it also include
the office of the appointee?

As to the rules of construction to be applied to constitutional provisions, the Supreme Court of this State in State ex rel. Carthage v. Hackmann, 287 Mo. 184, 190, 191 said:

"There are certain well-understood rules laid down by the courts for the construction of constitutional provisions, and they are the same as those governing legislative enactments!"

It was said in State ex rel. v. McGowan, 138 Mo., 1. c. 192, in discussing the regular rules of construction of constitutional provisions that, "The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it."

In 12 Corpus Juris, at page 700, it is said:

"**** The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. ****"

We are of the opinion that considering the mischiefs intended to be eliminated and the evils sought to be eradicated not only was it the intention of the people in adopting the constitutional provisions that the appointor (Board Member) forfeit his office but also that the appointee (City Attorney)

be without title to the office for which he was appointed. To reason otherwise would nullify the Constitution and allow an office holder to name his relative to office merely upon a forfeiture of his own office. Such was clearly not the intention of the people.

IV.

Does Section 13, of Article XIV. of
the Constitution of Missouri apply
to Cities of the Fourth Class?

In answer to the above question, we enclose a copy of an opinion written by the Honorable Gilbert Lamb, Assistant Attorney-General, wherein he held that Section 13 of Article XIV. of the Constitution of Missouri applies to officers and employees of Cities of all classes in the State of Missouri.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK
Attorney-General.

MW/OWS:afj