

ROADS AND BRIDGES - (1) Commissioner cannot appoint his brother
to work as laborer on the roads; (2) it is against public
policy to sell supplies to his (Commissioner's) road district;
and (3) city attorney of city in special road district may
charge for legal services rendered special road district.

October 7, 1942

Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

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FILED

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Dear Sir:

Your request of October 15, 1942, for an opinion on three questions, in reference to Special Road Districts organized under Section 8673 R. S. Missouri, 1939, has been received.

I

Your first question reads as follows:

"Can one Commissioner employ his brother to work as a laborer on the roads in said district and pay him out of the District funds?"

The constitutional section applicable to the above question is Section 13, Article XIV of the Constitution of Missouri, which reads as follows:

"Any public officer or employee 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."

There is no question but that the Commissioner of a Special Road District organized and acting under Article 10, Chapter 46 R. S. Missouri, 1939, is a public officer. He is a public officer for the reason that he has a designated term of office, as set out under Section 8675 R. S. Missouri, 1939. He is also invested with some portion of the sovereign functions of government to be exercised for the benefit of the public. That he is a public officer was held in the definition set out in the case of State ex inf. Ellis v. Ferguson, 65 S. W. (2d) 97, Par. 7, where the court said:

"The first question in this connection is: Is the mayor of a city of the third class a public officer? The answer must be yes. A public office is well defined to be: 'The right, authority and duty created and conferred by law, by which for a given period, fixed by law, * * * an individual is invested with some portion of the sovereign functions of government, to be exercised, for the benefit of the public,' and a public officer is one who receives his authority from the law and discharges some of the functions of government. Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700, 701."

If the Commissioner, as set out in the above question, has the power to appoint, or participates in the appointment of his brother to work in the road district, and pay him out of the district funds, he is violating Section 13 of Article XIV of the Constitution of Missouri, which section is self enforcing.

It has been held in this State that where the appointment is made by a board and the appointee comes within the limitations, as set out under Section 13, of Article XIV of the Constitution of Missouri, and is not appointed or voted upon by the board member who is a relative of his, the nepotism section is not violated. It was so held in the case of State v. Becker, 81 S. W. (2d) 948, l. c. 950, where the court said:

"The relator takes the position that the true meaning of said provision, as decided in that case, would render the appointment of Commissioner Sutton by the two members of the Court of Appeals not related to him, just as obnoxious to the provision as if one of the two were related to him; this, notwithstanding the fact that the third member, who is related to the proposed appointee, declines to participate in any manner in the purpose of his associates or in aid of the result of the combined action of the two.

"In the carefully considered opinion in that case, written by Gantt, C. J., the conditions that led to the adoption of the nepotism provision, and the evils sought to be corrected thereby, are pointed out and commented upon. It is unnecessary to repeat here what was there said in that regard. Any interested reader may examine that case for

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details. The decisive passage quoted by the relator from that opinion is 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.'

CONCLUSION

It is, therefore, the opinion of this department, that if the Commissioner participated in the appointment of his brother he has violated Section 13, of Article XIV of the Constitution of Missouri, but if his brother was appointed solely by the other two members of the Board of Commissioners, then Section 13, of Article XIV of the Constitution has not been violated.

II

Your second question reads as follows:

"Can a Commissioner order gasoline and other fuel to be purchased by the Road District foreman from a firm composed

of the Commissioner and his brother?"

In a careful research for prohibitions against an officer of a road district buying supplies from a firm in which the officer is a member, or is interested, we find no statute which prohibits such a purchase. The courts of this State, however, have held that such proceedings by officers of the state, county, or other municipal corporation is against public policy. The case of State v. Bowman, 184 Mo. App. Rep. 549, is a case where a member of the city council attempted to appoint himself city clerk of the city of Springfield, Missouri. In that case the court, in holding that it was against public policy for a public official to attempt to use his official power directly, or indirectly to increase the emoluments of his office, at page 557, said:

"A great statesman has voiced the basic principles governing official conduct by declaring that: 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

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The above case was a question of working for the body of which he was a member, but the same theory should apply to the buying of supplies or entering into contracts as a member of a body with a firm in which he is interested.

CONCLUSION

Therefore, it is the opinion of this department that it is against public policy for a Commissioner of a Special Road District, organized under Section 8673 R. S. Missouri, 1939, to order gasoline and other fuel to be purchased by the Road District foreman from a firm composed of the Commissioner and his brother.

We do not hold, however, that this is a criminal act, but do hold it would be a civil affirmative defense on a suit for the purchase price under the contract.

III

Your third question reads as follows:

"This being a Road District, in which the Commissioners are selected by the Mayor and Council, together with the County Court, would the City Attorney of the City, which created said district, be bound to render his services free, or without extra charge other than his usual salary as City Attorney, for legal advise to said commissioner, and his advise and legal work done in drafting a bond issue, if one Provision of the Ordinance is as follows:

"The City Attorney shall draft all bonds, contracts and such other instruments of writing as may be required by the City Council, and examine and inspect tax assessment rolls, and all proceedings in reference to the collection of taxes and assessments, and perform such other professional service incident to his office as may, in any case be required by the city council or any of its committees or officers."

In the facts stated in your third question, you have set out part of a city ordinance, which in no way effects the action of the city attorney in advising, or rendering services to the Special Road District of Ray County. The city attorney is employed by the city, the name of which you do not mention in your request, but the city in no way is connected with the Special Road District, except that in the organization of the road district, under Section 8675 R. S. Missouri, 1939, the mayor and members of the city council of the city within the special road district at the time of the organization, together with the members of the county court of the county in which the district is located meet within two weeks after the adoption of the proposed district and appoint a board of commissioners composed of three persons, one to serve three years, one for two years, and one for four years, who shall be resident taxpayers of the district, and serve until their successors are appointed and qualified.

The road district is a separate entity from that of the city and, under the provisions of Section 8674 R. S. Missouri, 1939, it is specifically set out that the road district shall be a body corporate, having a special name, and shall be capable of suing and being sued, and of contracting and being contracted with. The city, except physically, is in no way a part of the special road district. The ordinances of the city do not in any way govern or control the city attorney in his actions, in rendering his services as an attorney at law, for compensation, to the special road district, and his salary and employment do

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not include the rendering of such services without compensation.

CONCLUSION

Therefore, it is the opinion of this department that even though the city created the special road district, as organized under Section 8673 R. S. Missouri, 1939, the city attorney is not bound to render his services free or without extra charge for legal advice to said commissioners, or for his advice and legal work done in drafting a bond issue.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
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WJB:RW