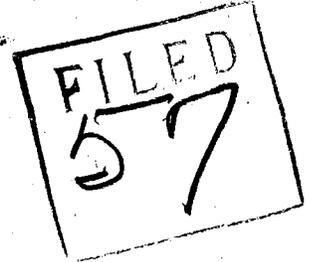


NEPOTISM: An officer approving an appointment submitted to him of an employee related to him within the fourth degree of consanguinity or affinity forfeits his office under the provisions of Section 6 of Article VII of the Constitution of 1945.

October 10, 1947

Honorable Samuel Marsh, Director
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of October 4, 1947, requesting an opinion from this department and reading as follows:

"In the light of the fact that Senate Bill #349 specifically provides that no appointments or discharges shall be made without the approval of the Director of the Department of Public Health and Welfare, will you please give me your opinion as to whether, if one of the division directors in the Department employed a relative within the fourth degree, by consanguinity or affinity, with my approval, the division director, or the department director, or both would suffer the penalty of loss of office under the provision of the Constitution referred to."

The Constitution of the State of Missouri 1945, Article VII, Section 6, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

It will be seen that the power to appoint employees is given to division directors and the power of approval of such appointments is given to the department director in Laws of Missouri 1945, page 947, Section 6, which reads, in part, as follows:

" * * * Each division director shall appoint, subject to the approval of the director of the department, all employees in his division and may discharge, subject to the approval of the director of the department, such employees after proper hearing; Provided, such employment and discharge conform to practices governing selection of employees in the department of public health and welfare."

This question will be discussed in two phases, first of which will be the instance of an appointment by a division director of a person related to the division director within the fourth degree of consanguinity or affinity, but not related to the department director within the fourth degree of consanguinity or affinity. In this case the action of the division director in making the appointment would obviously be in violation of Section 6, supra, even though the appointment would be subject to the approval of the department director. The leading case in Missouri interpreting this section of the Constitution is State ex inf. McKittrick v. Whittle, 63 S.W. (2d) 100. In this case the Court said, l.c. 101:

" * * * Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. 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." (underscoring ours.)

The second phase of this question is the instance of an appointment of a person, related to the department director within the fourth degree of consanguinity or affinity, by a division director, but not related to the division director within the fourth degree of consanguinity or affinity, which appointment is approved by the department director. In this instance it would seem that the underlined words in the case of State v. Whittle, above, would make this positive action of the department director a violation of Article VII, Section 6 of the Constitution of 1945. This, in spite of the fact that the department director does not have a power of appointment in the first instance, but because he participates in the appointment in a direct and positive manner, it would seem that such action would jeopardize the department director's office. In the case of State ex rel. McKittrick v. Becker, 81 S.W. (2d) 948, the court said, l.c. 950:

"We are of the opinion that the reason of decision*, as it appears in the quotation given, and as stated in the provision itself, does not support relator's position. The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. The only correlation expressed or implied is a specific kinship existing between two individuals, specifically indicated, and none other. No implication may properly be drawn from what has just been said that one clothed with a power of selection or appointment might not through connivance or confederation with his associates who share in such power bring himself within said prohibition. Such is not the present case. Nor have we any call to consider in what circumstances

one who acts in connivance in bringing about the appointment of a relative of an associate of his in the exercise of the power of appointment will suffer penalty as for violation of said provision."

(Underscoring ours.)

* Referring to the Whittle case, above.

Conclusion.

It is the opinion of this department that:

(1) The department director would forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, by approving an appointment by a division director of an employee related to the department director within the fourth degree of consanguinity or affinity; but that the division director would not forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, because of the lack of the forbidden relationship existing between the division director and the person appointed.

(2) The department director would not forfeit his office, under the provision of Article VII, Section 6 of the Constitution of 1945, by virtue of approving an appointment by a division director of an employee related to the division director within the fourth degree of consanguinity or affinity; but that the division director would forfeit his office by making such appointment. The department director would not be related to the person appointed within the fourth degree of consanguinity or affinity.

Respectfully submitted,

JOHN R. BATY
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APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml