

ASSESSOR:
ANTI-NEPOTISM:
DISCRETION:
QUO WARRANTO PROCEEDINGS:

(1) The assessor, Al Schwalm, has violated the anti-nepotism section (Section 6, Article VII, 1945 Missouri Constitution), and consequently, has forfeited his office. (2) It is within the discretion of the prosecuting attorney as to whether or not he shall bring an ouster action against the assessor.

(3) The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith.



April 5, 1956

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads as follows:

"The Buchanan County Assessor's office has a number of employees, or deputies, who work full time, mostly in the office and on a straight salary. They also have another type of employee, that of deputy field assessor. The field assessor goes out into the county and makes assessments. His salary is based directly on the amount of work he turns out. He gets paid a set price for each signed or unsigned assessment sheet (tax list).

"During the years 1955 and 1956, our County Assessor, Al Schwalm, hired his brother, Clarence Schwalm, as deputy field assessor. Clarence Schwalm has worked in the capacity of deputy field assessor for the past two years. He was paid in the year 1955 on the above-mentioned basis but payment to him has not been made in 1956, although he has worked. It would appear that this is in violation of Article 7, Section 6, of the Missouri Constitution.

"However, Clarence Schwalm was never sworn into office as a deputy assessor as provided for in Chapter 53, Section .060, RSMo 1949. He merely picked up his book and started assessing when it was impossible for his brother, Al Schwalm, to find anyone else to do the job.

Honorable Frank D. Connett, Jr.

"Any mistake made by Mr. Al Schwalm was made in good faith and the job Mr. Clarence Schwalm got is certainly not a desirable or highly paid one. Our questions are these:

"1. Under this set of facts, has Assessor Al Schwalm violated the anti-nepotism section of the Missouri Constitution, Article 7, Section 6, and thereby forfeited his office?

"2. If the answer to the first question is that Al Schwalm has violated the anti-nepotism section of the constitution, has the prosecuting attorney, in the light of all the facts, any discretion as to whether or not he should proceed to bring an ouster action against the said Al Schwalm?"

Your first question is whether or not the assessor, Al Schwalm, has violated the anti-nepotism section of the Constitution.

Article VII, Section 6, Constitution of Missouri, 1945, reads 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."

A reading of this section indicates that there are three necessary elements which must exist before there has been a violation of said section. First, the party to be charged must be a public officer or employee in this state. Secondly, he must name or appoint, by virtue of his office or employment, some party to public office or employment. Thirdly, the party named or appointed must be a relative within the fourth degree either by consanguinity or affinity.

That the first and third elements exist in the facts presented in the opinion request is unquestionable. It has been held that a mayor comes within the above-quoted section. *Ferguson v. State of Missouri ex inf. Ellis*, 54 S. Ct. 559, 291 U.S. 682, 78 L. Ed. 1070. It has also been held that a member of a school board is within the section. *State ex inf. McKittrick v. Whittle*, 63 S.W. 2d 100, 333 Mo. 705. The

county assessor is a public officer. The cases supporting this proposition are too numerous to cite. As to the third element, a brother is a relative in the second degree by consanguinity.

The only possible question as to whether there has been a violation of the anti-nepotism section is as to whether or not the second element is present; that is, whether or not the party to be charged has named or appointed a party to public office or employment in view of the fact that the brother, Clarence Schwalm, was never sworn into office.

The opinion of this office is that the above-quoted anti-nepotism section has been violated, and that, consequently, the office has been forfeited. This position is taken despite the fact that the oath was not taken under Section 53.060 RSMo 1949, which is as follows:

"Every assessor, except in the city of St. Louis, may appoint as many deputies as he may need, to be paid as provided by law. Each deputy shall take the same oath and have the same power and authority as the assessor himself. The assessor shall be responsible for the official acts of his deputies."

There are several reasons for sustaining this position. It is doubtful that the provisions of the section just quoted are related to the anti-nepotism section. Even if they are, the brother, Clarence Schwalm, was at least a de facto officer. See *State vs. Gray*, 190 So. 224, 192 La. 1081. Thus the assessor has appointed a party who is a de facto deputy assessor. Such an act is, it seems, within the prohibition of the anti-nepotism section. The purpose of said section is to prevent the office holder from creating a "family office" by putting his relatives within a certain degree, in his office. He, the party to be charged, forfeits by doing the act forbidden. *State v. Ellis*, 28 S.W. 2d 363.

A further reason in substantiating the opinion is that the anti-nepotism section does not limit the prohibition to appointment to public office; it also prohibits the public officer from naming or appointing a relative within the fourth degree to employment. Even if it could be said that there was no appointment to public office by reason of the fact that no oath was taken, it appears that the brother, Clarence, secured public employment. He was paid in 1955. The section expressly prohibits such, and for this reason, there was an automatic forfeiture of the office.

A third ground for sustaining the opinion is that to hold otherwise would result in allowing the public officer to do indirectly that which he could not do directly, to wit, putting his brother in his office. What would prevent others from doing the same? Again, this was what was intended to be prohibited by the Constitution.

Honorable Frank D. Connett, Jr.

Such a scheme plainly violates the Constitution, and the act of putting it into operation results in a forfeiture of his office.

Secondly, you ask whether or not you, as prosecuting attorney, have any discretion in bringing an ouster action against the said Al Schwalm.

It is the opinion of this office that you, as prosecutor, do have a discretionary power in this type of proceeding.

See *State ex inf. Folk v. Talty*, 166 Mo. 529, 66 S.W. 361, for a discussion of the question of discretion. In that case, the circuit court was petitioned to bring a writ of mandamus against a certain party. The circuit court issued a writ of mandamus commanding the circuit attorney to bring an information in the nature of quo warranto. The Supreme Court held that the circuit court had no authority to compel the circuit attorney to bring such an information; that the discretion is lodged with the Attorney General, or the circuit or prosecuting attorney to bring or not to bring such ouster proceedings.

Having the power of discretion does not mean, necessarily, that a public officer can refuse to act. The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith. In the case of *State ex inf. McKittrick v. Wymore*, 132 S.W. (2d) 979, an ouster action was brought against the prosecuting attorney for abuse of the discretionary power of his office. In holding that the prosecutor was to be ousted from his office, the court said at l.c. 986:

"He also argues that he is a quasi judicial official, and as such vested with discretion in the performance of duty.

"We also agree that in performing his duties he is authorized to exercise a sound discretion. However, 'there is nothing sacred about the words quasi judicial'. In *Ex parte Bentine*, 181 Wis. 579, 196 N.W. 213, 215, 216, it was correctly ruled as follows: 'A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty'. Of necessity, 'in distinguishing between the certainly and doubtfully guilty', the prosecuting attorney should make a reasonable effort to discover witnesses and interview

Honorable Frank D. Connett, Jr.

them with reference to the facts. After doing so he should give careful consideration to both the law and the facts before determining the question of prosecution or no prosecution. He has no arbitrary discretion, and sound discretion is not usable as a refuge for unfaithful prosecuting attorneys.

"The rule is stated as follows:

"It is the duty of the prosecuting attorney to initiate proceedings against parties whom he knows, or has reason to believe, have committed crimes. * * * The fact that his duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part.* * *

"The contention made by the appellant is to the effect that, because a wide discretion is vested in the prosecuting attorney with reference to the prosecution of parties for crime, the right of discretion must necessarily shield him from indictment or prosecution for omission to perform his duties. This court takes a contrary view of the law. It is the duty of the prosecuting attorney, under the statute, though endowed with discretion in the performance of his duties, to exercise his discretionary powers in good faith'. *Speer v. State*, 130 Ark. 457, 198 S.W. 113, 114, 115."

However, it is beyond the power of this office to inform you in the exercise of that discretion. Discretion is personal to the party having the power. It is to be exercised by the party having the discretionary power according to his own judgment and conscience, uncontrolled by the judgment or conscience of others.

CONCLUSION

It is, therefore, the conclusion of this office that;

(1) The assessor, Al Schwalm, has violated the anti-nepotism section (Section 6, Article VII, 1945 Missouri Constitution), and, consequently, has forfeited his office.

(2) It is within the discretion of the prosecuting attorney as to whether or not he shall bring an ouster action against the assessor.

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(3) The discretion to be exercised by the prosecuting attorney is not an arbitrary one, but one that must be exercised in good faith.

Yours very truly,

JOHN M. DALTON
Attorney General

HLH/vlw/bi