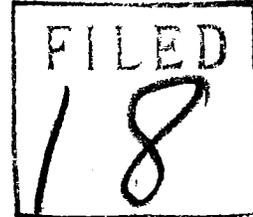


Nepotism:

Employment by County Judge on hourly or monthly basis of park employee who later marries relative of judge during period of his employment does not constitute violation of Article 7, Section 6 of Constitution 1945. Signing employee's payroll for service performed does not constitute an employment.

January 26, 1961



Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City 6, Missouri

Dear Mr. Collet:

This office is in receipt of your request dated January 16, 1961, for an official opinion as follows:

"I would deeply appreciate it if at your earliest convenience you would furnish me with an opinion as to whether the below listed state of facts constitute a violation of Article 7, Section 6, the anti-nepotism provision of the Missouri Constitution.

On May 25, 1959, one T. C. was employed by an order upon the affirmative vote and signature of one of the judges of the Jackson County, Court. At this time, T.C. resided with his parents in Johnson County, Kansas, and was betrothed to the daughter of this judge. On the first payroll record of the County Clerk his address was listed at the same address of the particular county judge which address is a single family address. The position for which T.C. was employed was that of a utility man in the Jackson County park. The monthly compensation varied and was based on the number of hours actually worked computed at an hourly rate. On June 6, 1959, approximately two weeks after the employment T. C. married the daughter of this judge and continued his position

Honorable William A. Collet

throughout the months of June, July, August and part of September. On each of these months subsequent to the marriage his compensation was based on an hourly rate and the payroll was signed by the particular county judge.

I am not unmindful of two prior opinions of your office holding that a subsequent marriage after the employment does not constitute a violation of the section. However, I noted that in each of these prior opinions, December 3, 1940, to Elmer A. Strom, October 5, 1933, to J. W. Van Ness dealt with school teachers whose employment was for a definite school term and not on an hourly or monthly basis as in the present case."

The constitutional provision presently applicable is contained in Article VII, Section 6 of the Constitution of Missouri 1945 which 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."

As noted in your request there are two prior opinions of this office construing the similar provisions of Article XIV, Section 13 of the Constitution of 1875, as adopted February 26, 1924. These opinions hold that where, at the time of the naming or appointing, a teacher is not related within the fourth degree to a director who votes for her appointment, the subsequent marriage of such teacher to a relative of the director, does not result in a violation of the constitutional provision. It is the opinion of this office that these prior opinions are equally applicable to the present constitutional provision.

In the cases involved in the prior opinions the teachers were employed for a definite period of time whereas in the matter referred to in your question the employee was employed on an hourly or monthly basis and paid only for time actually worked. The question is whether such difference in facts impels a different conclusion.

It is our opinion that in either situation, the constitutional provision in question applies only when the person appointed is a relative within the fourth degree at the time such person is named or appointed to public office or employment. The fact that he may

Honorable William A. Collet

later become such relative by a voluntary act on his part cannot work a forfeiture of the office of the appointing official.

As we construe the question, the actual employment in which the Judge of the County Court participated was on May 25, 1959, and that there was no further act on such Judge's part, except as hereinafter noted, which related to such employment.

The general rule is that an indefinite employment at so much per month, per week, or per day, but without any definite term, is employment at will and that in such case either party may terminate the employment at any time. Forsyth v. Board of Trustees of Park College, 240 Mo. App. 622, 212 S.W. 2d 82, 85; Bell v. Faulkner, Mo. App. 75 S.W. 2d 612. In the Forsyth case, it was held, quoting from the earlier case of Brookfield v. Drury College, 139 Mo. App. 339, 1235 W. 86:

"The law in this state has been well stated that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time.* * *"

However, until either party has in fact terminated the employment, such employment does not cease but continues even though the employee is paid only for time actually worked. See for example ACF. Industries, Inc. v. Industrial Commission, Mo. 320, S.W. 2d 484, where the Court had for consideration the effect of the employee having been "laid off." The Supreme Court stated the following:

"The term 'layoff,' in the field of employment, has a well-defined meaning. See Webster's New International Dictionary, 2nd Ed. It does not mean termination of employment, but rather does it mean: 'The act of laying off, esp. work or workmen; a period of being off or laid off work; a shutdown; a respite.* * *'"

"We hold that claimant, although laid off by appellant on November 2, 1956, remained an employee of appellant within the clear intent and meaning of the contract until his discharge on January 11, 1956." (The Court meant January 11, 1957, and the figure "6" is clearly a typographical error).

The fact that in the instant case the payroll was signed by the Judge of the County Court who participated in the appointment and that he did so after the employee became related to him does

Honorable William A. Collet

not in the opinion of this office, constitute either the naming or appointment of such employee to a public office or employment. The employee was theretofore named or appointed, and by reason of having performed the services was entitled to his compensation.

CONCLUSION

It is the opinion of this office that a County Judge who names or appoints to public employment a person who at the time of such appointment is not related to him, does not forfeit his office by reason of the fact that subsequent to such appointment the employee becomes related to the County Judge and that such Judge signs the payroll. The fact that such employee is employed without a definite term on a monthly basis and paid only for time actually worked does not alter the conclusion.

The foregoing opinion, which I hereby approve, was prepared by my assistant Joseph Nessenfeld.

Yours very truly,

Thomas F. Eagleton
Attorney General

JN:jh