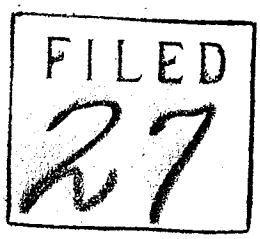
OFFICERS: Violation of nepotism provision by appointing authority does not authorize removal of public
NEPOTISM: officer appointed; appointment of more persons from one political party to county highway commission than statute authorizes does not disqualify the person from county highway commission.



April 27, 1955

Honorable Loyd J. Estep
House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Estep:

We have received your request for an opinion of this office, which request reads as follows:

> "How can the County Court dismiss a public officer such as a County Highway Commissioner which has been appointed by a previous County Court in violation of the constitution regarding nepotism?
>
> "Further, if on the highway commission consisting of four members chosen bipartisan, there happens to be three members known to affiliate with one political party, how may this inequality be changed?
>
> "Particularly, we would like to know whether or not this would require action by a court of record."

Section 230.020, RSMo 1949, provides:

> "Within sixty days after the taking effect of this chapter, it shall be the duty of the county court in all counties of this state, except as otherwise in this chapter provided, to appoint four members of the county highway commission, one for a term of one year; one for a term of two years; one for a term of three years; and one for a term of four years. Upon expiration of the term of each of said commissioners his successor shall be appointed for a term of four years, and every such commissioner

> shall hold office for the term appointed and thereafter until his successor is appointed and qualified. Not more than two of said commissioners shall be appointed from the same county court district, and not more than two thereof shall be affiliated with the same political party. No person shall be eligible to appointment as a member of the county highway commission who shall not have attained the age of twenty-five years, and who at time of his appointment is not a bona fide resident of county wherein appointed, and possessed of a knowledge of the interest of said county, and a known supporter and advocate of a system of county highways, constructed and maintained with a view to affording the greatest convenience to the greatest number of inhabitants of the county in the matter of farm-to-market roads. Within ten days after their appointment the members of such county highway commission shall meet at the county seats and organize by the election of one of their number as president, and another as secretary, of said commission."

Section 6, Article VII of the Constitution of Missouri, 1945, provides:

> "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."

There is no constitutional or statutory provision regarding the effect of relationship to the appointing authority within the constitutional limitation upon the person appointed to office.

The office of county highway commissioner is a public office. State ex rel. Flowers v. Morehead, 256 Mo. 683.

Section 4 of Article VII, Constitution of Missouri, 1945, provides:

> "Except as provided in this Constitution, all officers not subject to impeachment

> shall be subject to removal from office in the manner and for the causes provided by law."

There is nothing in Chapter 230, RSMo 1949, which authorizes a county court to remove a member of the county highway commission for any cause whatsoever. In the case of State ex rel. Flowers v. Morehead, supra, the Supreme Court discussed the question of removal of a member of the county highway board, the predecessor to the county highway commission. In that case the court stated:

> "Under the express statute, therefore, creating the position of a member of the highway board and in the light of the reasons stated in the cases above cited, an appointee to this position, upon qualifying, becomes a public officer, the act of his creation not only stating his term but definitely defining his duties. (Secs. 4 to 9, both inclusive, Laws 1913, p. 666.) It must be borne in mind in determining the character of this position, that it is the functions the appointee is required to perform, that determines the character of his office, and it is not material to this characterization that no salary or fees are annexed thereto, and that the position is merely honorary and exists only for the public good. (Clark v. Stanley, 66 N.C. 59, 67; Throop on Public Officers, sec. 3, p. 4.) It is provided in the Constitution (Art. 14, sec. 7, Constitution) that 'the General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of wilful, corrupt or fraudulent violation or neglect of official duty;' in construing this section this court has held that the Legislature is not limited in enacting statutes of removals to the acts specified in the Constitution, but it may make such reasonable and proper provisions regulating same as may seem just. (State v. Boyd, 196 Mo. l.c. 59, 66; State ex rel. v. Sheppard, 192 Mo. 497, 506; Manker v. Faulhaber, 94 Mo. 430, 438.)

"No particular statutory method has been provided, however, for the removal of members of county highway boards, and a reference to the general statute in regard to the removal of county, town and township officers (Sec. 10204 et seq., R.S. 1909) is necessary to determine where the authority lies and what facts will sustain such a proceeding. Without literally quoting the general statute it will suffice to say that while broader than the constitutional provision (Sec. 7, Art. 14, supra) it limits the causes of removal to dereliction of or willful refusal to perform official duty, and requires the proceedings to be commenced and heard in the circuit court.

"In the absence, therefore, of particular statutes, the methods prescribed and the reasons assigned in section 10204 et seq., supra, are the limits of authority for the removal of members of any of the classes of officers therein specified. Members of county highway boards being public officers are properly designated as one of such statutory classes, and, therefore, subject to the provisions of the general statute in regard to removal. Their terms are definitely defined by law, and their duties are all of a public nature, and, while the statute is silent in regard to the subject, their removal will not be justified unless in each instance notice of proceedings therefor is given them, and they are afforded an opportunity to be heard in their own behalf (State ex rel. v. Maroney, 191 Mo. 531); or, in other words, as elaborately and learnedly discussed in State ex rel. v. Sheppard, 192 Mo. 497, they cannot be deprived of their offices without resort to the forms of the law.

"There is no pretense that the relator was removed for other cause than that the county court deemed his appointment unauthorized in the first instance on the theory that the court's power of appointment was limited to two members who with the highway engineer would constitute said board. Relator's removal, therefore, under the circumstances, was without statutory sanction, and unauthorized."

Section 106.220, RSMo 1949, provides:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290."

Relationship to the appointing authority would not be grounds for ouster of the person appointed under this statute.

"The incumbent of an office should not be deprived of it except in accordance with the law of the land. If the organic law of the government entity is silent as to the mode of procedure, or the legislature makes no provision for the manner of removal, the officer must be deposed, as provided for by the fundamental law; and the substantial principles of the common law as to proceedings affecting private rights must be observed." 67 C.J.S., Officers, Section 59, page 241.

Relationship by affinity or consanguinity is not a disqualification in the absence of constitutional or statutory provision making it such. Rupert v. VanBuren County, 296 Mich. 240, 295 N.W. 630; 60 C.J.S., Officers, Section 22, page 133. In the absence of any provision making such relation the basis for disqualification of the person appointed to office, it appears that there would be no grounds in this state for removal from public office of one appointed by an official who violated the anti-nepotism provision of the Constitution. Section 6, Article VII of the Constitution, supra, imposes punishment for its violation only upon the appointing authority, and absent statutory disqualification of a person appointed by reason of such relationship, we are of the opinion that such relationship does not afford the proper basis for the removal from office of the person appointed.

As for your second question, Section 230.020, RSMo 1949, above quoted, provides, in part:

> "Not more than two of said commissioners shall be appointed from the same county court district, and not more than two thereof shall be affiliated with the same political party."

In view of the decision in the case of State ex rel. Flowers v. Morehead, supra, there would appear to be no basis for the removal of the member of the county highway commission because his appointment results in more than two members of the same political party being members of the commission.

Furthermore, cases dealing with statutes such as this throw doubt on the question of whether or not the provision requiring that not more than a certain number of members of a board or commission belong to the same political party actually imposes a qualification upon the person appointed. In the case of Harrell v. Sullivan, 220 Ind. 108, 40 N.E. (2d) 115, 140 A.L.R. 455, l.c. 457, the court stated:

> " * * * A statute which provides for a board or commission of a certain number, no more than a certain proportion of whose members shall belong to the same political party, imposes a limitation and not a qualification. * * *"

See also State ex rel. Simeral v. Seavey, 22 Neb. 454, 35 N.W. 228.

Our research has not revealed one case in which an officer was held subject to removal because the appointing authority disregarded a statutory provision relative to the number of persons who might be appointed to a board or commission from one political party. In the absence of any such authority, we are unable to say that such fact alone would be a proper basis for the removal of such person from office.

CONCLUSION

Therefore, it is the opinion of this office that:

1. In the absence of constitutional or statutory provisions disqualifying a person who has been appointed to public office

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by an official who violated the anti-nepotism prohibition of the Constitution, we are of the opinion that relationship within the prohibited degree is not grounds for removal from office of the person appointed;

2. The appointment of a person to the county highway commission which results in that body's having three members of the same political party does not afford any basis for the removal from office of the person so appointed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml