

NEPOTISM: One is guilty of violation of nepotism section even when appointee receives no compensation.

January 23, 1942

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Honorable Robert A. McIlrath
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We are in receipt of your request for an official opinion, under date of January 7th, which reads as follows:

"I would like to have an official opinion from your department as to whether or not a sheriff who receives pay only through fees can hire as one of his deputies a person within prohibited degree of kinship within the nepotism provision, Section 13 of Article 14 of the Constitution of the State of Missouri."

Section 13, Article XIV, of the Constitution of Missouri, 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."

In your request you state that a sheriff who only receives compensation by fees, intends to appoint a deputy who is a relative within the fourth degree. Under the above section it is not necessary that the relative who is appointed receive compensation in any manner. The section is violated by the appointment and not by the fact that he is to receive compensation.

A sheriff is a public officer for the reason that he comes within the definition of a "public officer" as set out in the case of *State ex inf. Ellis v. Ferguson*, 65 S. W. (2d) 97, 1. c. 99, where the court said:

"This section is self-enforcing as has hitherto been held by our court. *State ex inf. Norman v. Ellis*, 325 Mo. 154, 28 S. W. (2d) 363. It has recently been under construction by our court in the case of *State ex inf. McKittrick, Atty.-Gen. v. Whittle*, 63 S. W. (2d) 100, at the May term, last, wherein it was held that school districts are political subdivisions of the state, and school directors are public officers within the contemplation and meaning of said nepotism section.

"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."

The above case also holds that Section 13, Article XIV, of the Constitution of Missouri, is self-enforcing, and for that reason the Legislature has not enacted any law carrying out the prohibition set out in that section.

The case of State ex inf. Ellis v. Ferguson, supra, was affirmed by the United States Supreme Court in State of Missouri ex inf. Ellis, 54 Sup. Ct. 559, 219 U. S. 682, 78 L. Ed. 1070.

Conclusion

In view of the above authorities it is the opinion of this Department that a sheriff cannot appoint as deputy a relative within the fourth degree, either by consanguinity or affinity. It is further the opinion of this Department that if a sheriff makes such an appointment, he forfeits his office, and the fact that the deputy does not receive any pay does not alter the situation.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:EG