County Court--Power to employ one of their own members to perform administrative acts.

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March 7, 1933

Honorable Virgil L. Rathburn
Prosecuting Attorney Nodaway County
Maryville, Missouri

Dear Mr. Rathburn:

I am answering your request of November 25th, 1932, to Attorney General Shartel, for an opinion from this office. You state,

> "I am inclined positively to the view
>
> (1) that administrative and ministerial functions of the county court can be delegated.
>
> (2) And I am of the belief that the act of employing one of their own body as an individual to render this service is not prohibited, either by the terms of the nepotism amendment, or by the intent of the legislature in enacting Section 2089 R. S. Missouri 1929."

You further state:

> "If you can see fit to render an opinion on such a state of facts at this time, I shall greatly appreciate the benefit thereof."

On December 6, 1932, James A. Finch, Jr., then Assistant Attorney General, answered your request stating:

> "It will be impossible to prepare the opinion immediately."

On January 12, 1933, three days after this administration took office, I wrote to you stating:

> "I am inclined to believe that the matter has ironed itself out, and that you would prefer at this instant not to have my opinion, but if you insist let me know by return mail."

On January 16th, 1933, I received your letter of acknowledgment where you stated:

> "I am not requesting from your office an opinion at this time. However, I am inclined to believe that others may request such an opinion in the future."

When later I say you in the office you renewed your original request for this opinion.

On February 14th, 1933, this office received a letter from D. O. Belt, Treasurer of the Farm Bureau, where he says:

> "Mr. Rathburn reports to me that he has asked your office for an opinion and that it was referred to Mr. Sawyers, and that he had acknowledgment of its assignment."

Your excellent brief furnished this office on the questions involved is hereby acknowledged, and there is merit in your logic. I must unqualifiedly agree with you on that part of your opinion dealing with the first proposition and say that it is the opinion of this office

> "that administrative and ministerial functions of the county court can be delegated."

The second question involved in your request is not covered by the nepotism law nor Section 2089 R. S. Mo. 1929, hence the second proposition is still and open question unless there be other laws to the contrary. I respectfully offer my opinion on the issue, as per your request.

The Constitution of the State of Missouri, Article 6, Section 36 is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, * * * * *"

Section 12162 R. S. Mo. 1929, provides as follows:

> "The county court shall have the power to audit, adjust and settle all acts to which

the county shall be a party;***"

In State v. Draper, 45 Mo. 355, the court has said, and there is abundant authority for this holding:

> "Common law is that an individual cannot hold two offices, the duties of which are incompatible."

The question may arize that one employed by the county court is not an officer within the meaning of the law. The courts have undertaken to give definitions as to who is and who is not an officer within the meaning of the law, and these definitions vary in different jurisdictions, but in my judgment they are agreed on this general proposition that if an officer receives his authority from the law, and discharges some of the functions of government, he is considered a public officer.

State v. Valle, 41 Mo. 30.

People ex rel v. Langdon, 40 Michigan 630.

Rolland v. Mayor, 83 New York, 376.

State ex rel v. May, 106 Mo. 488.

In the case of Meglemeyer v. Weissinger (Ky), 131 S. W. 40, which is a leading case and has been cited by the Missouri Appellate Court in State v. Bowman, 184 Mo. Ap. 549, you will find the exact statement of facts as presented to this office by you for an opinion. You will find that the court ruled in that Kentucky case without having a specific statute or constitutional provision cited. This is the exact position that I am in now, there being no statute or constitutional provision in this State which are applicable directly to your statement of facts and which your brief will show. In that case it was held that the fiscal county court empowered to employ a bridge commissioner, a salaried officer, could not appoint one of their own number. The court held the appointment void as against public policy and said:

> "Nor does the fact*****that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is ledged in the body of which he is a member is one, but not the only reason

> why it is against Public Policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay."

Other cases of like or similar holding are numerous.

> Smith v. City of Albany, 61 N.Y. 444.
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> Gaw et al v. Ashley, 80 N.E. 790 (Mass):
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> People v. Thomas, 33 Barbour's Reports 287;
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> Ohio ex rel v. Taylor, 12 Ohio Street 130;
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> Kinyon v. Duchene, 21 Michigan 497.

To say that the duties of the office of county judge and the office to supervisor of county projects are not incompatible, one must say that the people by their fundamental law, intended that the county judge and his associates could be the dispenser of public funds and at the same time recipient of his own official bargains, which it was his duty as one of the administrative officers of the county to strike. If such be the law, then he has the power indirectly to audit his own account. I have no doubt that in your county such an arrangement can be shown operating at a savings to the tax payers, but as a general proposition of law, to sanction that county judges have the constitutional duty of paying for personal administrative services rendered the county, and at the same time the implied power of receiving money personnally for personal

administrative services in addition to official salary and granting acquittance for the same money which was his duty to pay to himself, seems incompatible. To hold otherwise as a general proposition, judges of the county court throughout this state could conspire together with each other and employ each other thereby perpetuating themselves in office.

It is the opinion of this office, that the offices of county judge and supervisor of county projects are incompatible in the same person, hence the common law rule above set out should apply.

It is the further opinion of this office that county judges employing one of their own body for a wage is unlawful, as against PUBLIC POLICY.

Very truly yours,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED
ROY McKITTRICK
Attorney General.

WOS/mm