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February 21, 2017

ATTORNEY GENERAL OPINION NO. 2017-7

Seth A. Jones
Neosho County Counselor
Hines & Jones, P.A.
P.O. Box 108
Erie, KS 66733

Re: Counties and County Officers—County Treasurer—Deputy Treasurers;
Budget; Limitation of Personnel Action

Synopsis: A board of county commissioners does not have legal authority to supersede another elected county official's power to appoint, promote, demote, or dismiss his or her personnel. Cited herein: K.S.A. 2016 Supp. 19-101a; K.S.A. 19-302; 19-503; 19-805; 19-1202.

* * *

Dear Mr. Jones:

As County Counselor for Neosho County (County), you ask our opinion on whether a board of county commissioners (BOCC) can enforce the county's anti-nepotism policy with respect to personnel under the direct supervision of another elected county official when that official refuses to do so. For the reasons discussed below, we believe that it may not.

Background

In your request for opinion, you explained that the recently-elected county treasurer would be taking over a department in which her "immediate relative," as defined by the

county's anti-nepotism policy, was already employed. In other words, upon taking office, the treasurer-elect would have a direct supervisory role over her immediate relative. The County adopted an anti-nepotism policy which reads, in pertinent part:

It is Neosho County's policy that immediate relatives will not be employed in regular full-time or regular part-time positions where:

1. One relative would have the authority to supervise, appoint, remove, discipline or evaluate the performance of the other.
2. One relative would be responsible for auditing the work of the other.
3. Other circumstances which would place the relatives in a [position] of actual or reasonable foreseeable conflict between the County's interests and their own.
4. Any employee employed on or before the effective date of this policy (October 1, 1996) who has any relationship which would violate the above provisions is hereby exempt from the terms of this [policy] with regards to their current position.

When it is necessary to exclude a person because of his or her immediate family relationship, then Neosho County will determine which spouse shall keep the job. Neosho County may require one spouse to quit 60 days after marriage if they become in violation of this [policy] and a mutually-agreeable solution cannot be reached between the County and the employees.

...

Relatives of persons currently employed by Neosho County may be hired only if they will not be working directly for, or supervising, a relative. In addition, Neosho County employees cannot be transferred into such a reporting relationship.¹

Analysis

Under the Kansas home rule statute for counties,² a BOCC in each county has the authority to "transact all county business and perform all powers of local legislation and administration it deems appropriate," subject to certain enumerated restrictions.³ The applicable exceptions that address your question are found in K.S.A. 2016 Supp. 19-101a(a)(1)(6) and (14), which provide:

¹ Correspondence, Seth A. Jones, December 23, 2016.

² K.S.A. 2016 Supp. 19-101a(a).

³ *Id.*

(6) Counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers.

...

(14) Counties may not exempt from or effect changes in K.S.A. 19-302, 19-502b, 19-503, 19-805 or 19-1202, and amendments thereto.

Kansas statutes uniformly created several elected offices within each county, including the offices of county clerk, county treasurer, sheriff, and register of deeds. Although different statutes apply to the various officials, each of these statutes provides:

Any personnel action taken by [the elected official] shall be subject to the following: (1) Personnel policies and procedures established by the board of county commissioners for all county employees *other than elected officials*; (2) any pay plan established by the board of county commissioners for all county employees other than elected officials; (3) any applicable collective bargaining agreements or civil service system; and (4) the budget for the financing of the operation of [the official's] office as approved by the board of county commissioners.⁴

This statutory language requires the county clerk, county treasurer, sheriff, and register of deeds to abide by the county's personnel policies when taking personnel action. In Attorney General Opinion No. 80-264, Attorney General Robert Stephan considered whether Ellis County could adopt an anti-nepotism policy that applied to all elected county officials and appointed department heads, ultimately concluding that "the Ellis County resolution which prohibits county officers from employing members of their immediate family in county departments or offices is a valid exercise of the county home rule powers." In reaching this conclusion, the opinion noted but ultimately rejected the argument that such a policy would unduly limit the executive power of elected county officials to hire qualified individuals.

However, the Kansas Supreme Court addressed similar circumstances in *Board of County Commissioners of County of Lincoln v. Nielander*,⁵ a case in which the Lincoln County Sheriff disputed the Lincoln County Commissioners' authority to fire a deputy sheriff.⁶ On appeal, the Kansas Supreme Court recognized that while "personnel action taken by [an elected county official] is 'subject to' personnel policies, payment plans, collective bargaining agreements, and budgets established by boards of county commissioners," these restrictions do "not give county commissioners the ability to supersede [an elected county official's] power to appoint, promote, demote, or dismiss

⁴ K.S.A. 19-302(c) (county clerk); K.S.A. 19-503(c) (county treasurer); K.S.A. 19-805(d) (sheriff); K.S.A. 19-1202(c) (register of deeds) (emphasis added).

⁵ 275 Kan. 257 (2003).

⁶ *Id.* at 259-60.

his or her personnel.”⁷ To the extent the anti-nepotism policy reviewed in Attorney General Opinion No. 80-264 applied to other elected county officials, we withdraw that portion of the opinion. Following *Nielander*, the BOCC cannot enforce its anti-nepotism policy with respect to personnel under the direct supervision of another elected county official, as doing so would supersede that official’s power to appoint, promote, demote, or dismiss his or her personnel. This conclusion is in accord with our recent opinion that a BOCC does not have legal authority to subject another elected county official to personnel policies and procedures requiring random drug testing.⁸

In summary, we conclude the BOCC may not enforce its anti-nepotism policy with respect to personnel under the direct supervision of another elected county official when that official refuses to do so.

Sincerely,

Derek Schmidt
Kansas Attorney General

Craig Paschang
Assistant Attorney General

DS:AA:CP:sb

⁷ *Id.* at 257, Syl. ¶ 6.

⁸ See Attorney General Opinion 2016-16 (“because county elected officials are . . . coequal agents of the county body politic and not subordinate to one another, a BOCC does not have legal authority to subject a county clerk, county treasurer, county sheriff or county register of deeds to personnel policies and procedures requiring random drug testing.”).