



STATE OF KANSAS

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June 23, 1981

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ATTORNEY GENERAL OPINION NO. 81- 140

Frank E. White, Jr.  
Chautauqua County Attorney  
P. O. Box 417  
Sedan, Kansas 67361

Re: Counties and County Officers -- Board of County  
Commissioners -- Anti-Nepotism Resolution Affect-  
ing Individuals Currently Employed

Synopsis: Employment by a county creates no vested right or  
property interest, and in the absence of any civil  
service system which requires that termination be  
for cause and only after a hearing, an employee  
may be discharged at any time. Accordingly, the  
passage by a county commission of an anti-nepotism  
resolution may affect existing employees as well  
as those hired subsequent to the date of the reso-  
lution. Cited herein: K.S.A. 13-2903, 14-537,  
K.S.A. 1980 Supp. 19-101a, K.S.A. 19-235, 19-302,  
19-503, 19-706b, 19-805, 19-1202, 28-706, 74-605,  
L. 1921, Ch. 171, §1.

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Dear Mr. White:

As County Attorney for Chautauqua County, you request the  
opinion of this office on a resolution which is currently  
being considered by the county commission. Such resolution  
would establish an anti-nepotism policy on the county level  
by prohibiting the employment of persons who are related by  
blood or marriage to county officials in departments or offi-  
ces of the county. Your inquiry concerns whether the effect  
of such a resolution may be only prospective in effect, or  
if it can affect these individuals currently employed who  
fall within the prohibited degrees of relationship.

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The problem of nepotism is not a new one, extending back at least to the Middle Ages. From the Latin word for nephew "nepos," New Webster's Dictionary, p. 563 (1971), the term originally described the practice of churchmen who, while celibate and hence childless, would employ their nephews, regardless of merit, in lucrative patronage positions. Together with simony (the practice of selling church offices), nepotism represented an early form of "featherbedding" which frequently led to waste and inefficiency. Although condemned at various church councils, the practice died hard, and provided fuel for the Reformation.

Today, the term is applied beyond an ecclesiastical context, and has come to mean the appointment or employment of a relative by an elected or appointed official, with the degree of relationship prohibited left to the particular statute. While Kansas has no constitutional prohibition against the practice, separate statutes have at times been enacted dealing with nepotism at various levels of government. A current example is K.S.A. 13-2903, which prohibits the relatives by blood or marriage of the mayor or commissioners in a first class city from holding any city office during the latter's terms. Similar prohibitions appear at K.S.A. 14-537 (park commissions in second class cities) and K.S.A. 74-605 (members of the Kansas Corporation Commission). While no statute delineates the power of a county in this regard, a recent opinion of this office (Attorney General Opinion No. 80-264) concluded that the passage of a resolution of the type envisaged by Chautauqua County was permissible, as falling within the home rule powers granted by K.S.A. 1980 Supp. 19-101a. We would reaffirm the conclusion reached therein.

However, our earlier opinion is of only partial assistance here, for the resolution at issue there was specifically limited to future employees, while the resolution being considered in Chautauqua County extends to all persons now employed who are related, by blood or by marriage, to a county official. As the enforcement of such a resolution could result in these persons discharge, it must be determined whether such action would infringe upon vested rights and hence be beyond the scope of the county's authority. 6 McQuillin, Municipal Corporations, §20.70, 3rd rev. ed. (1979).

Initially, a distinction must be made between county officials, who are invested with some portion of the sovereign functions of the government, and employees, who are under an officer's direction and control. Sowers v. Wells, 150 Kan. 630 (1939), Miller v. Ottawa County Comm'rs., 146 Kan 481 (1937). The former, whether elected or appointed, are generally recognized

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as being entitled to certain protections from removal from their positions. If the office is a statutory one, there must be compliance with the provisions prescribed by statute for removal. State ex rel. v. Wilson, 30 Kan. 661 (1883). Even if appointed, an officer still is entitled to due process before his removal can be effective. 56 Am.Jur.2d Municipal Corporations, §314.

Employees, on the contrary, may be removed without cause and without any notice or hearing. Ross v. City of Cedarvale, 123 Kan. 344 (1927). Of course, if the employee has the protection of a civil service system [Piper v. City of Wichita, 174 Kan. 590, (1953)] or if a particular method of discharge is provided by statute or ordinance [Bassler v. Gordon, 119 Kan. 40 (1925)], such procedures must be followed. Otherwise, the discharge of an employee is an administrative matter (56 Am.Jur.2d Municipal Corporations, §309), even if the employment is for a definite term [4 McQuillin, Municipal Corporations §12.250, 3rd rev. ed. (1979)], and as such does not give rise to constitutional questions.

Of particular interest to your inquiry is the case of Bailey v. Turner, 108 Kan.856 (1921). In that case, a situation was presented to the Kansas Supreme Court much like that presented by your request here, i.e., can an anti-nepotism measure be given retroactive effect? The statute at issue in Bailey (L. 1921, ch. 171) amended several previous statutes dealing with court reporters, and added new language in section 1 which provided: "that no court reporter shall be related by blood to the presiding judge of the court wherein he is employed." Bailey, being the nephew of the district judge, was declared by the state auditor ineligible to receive payment for his services after the effective date of the act, and accordingly brought a mandamus action before the supreme court.

In denying Bailey relief, the court reasoned as follows at p. 859:

"The plaintiff advances the theory that he holds his place as court stenographer under his original appointment until his successor is named. We are aware of no law giving him that tenure. He was selected for no definite period. He held his place only during the pleasure of the judge, and could continue to hold it only by his express or implied permission, and that permission, however given, may be regarded as amounting to a new appointment.

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The language of the new act is not that no reporter shall be appointed who is related to the judge but that no reporter shall be related to him. This is the more significant because this court had previously said there was force in the contention that a statute providing that no person should be appointed to an office by a relative did not forbid one who had already been appointed in that manner from continuing to act. If the purpose of the act under consideration had been merely to prevent an addition to the number of relatives of judges who were already serving as court stenographers it seems probable that the draftsman would have used language at least as appropriate to that purpose as that of the statute considered in the case just cited. We conclude that the legislature intended to prevent the retention of stenographers already in office who were related to the appointing judge, as well as to forbid the selection of new ones."

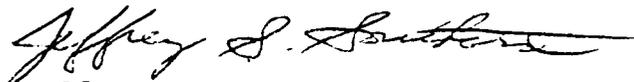
In our opinion this holding sanctions the course of action considered by the commissioners, leaving them free to apply the anti-nepotism resolution to both present and prospective employees.

In conclusion, employment by a county creates no vested right or property interest, and in the absence of any civil service system which requires that termination be for cause and only after a hearing, an employee may be discharged at any time. Accordingly, the passage by a county commission of an anti-nepotism resolution may affect existing employees as well as those hired subsequent to the date of the resolution.

Very truly yours,



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Jeffrey S. Southard  
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RTS:BJJ:JSS:hle