

OPINION 15

ordinances at Richmond, Indiana, against nepotism, I am of the opinion that the following existing state nepotism statutes have no application to the specific questions presented by you for my consideration.

Acts of 1941, Ch. 16, Sec. 1, as amended and found in Burns' (1961 Supp.), Section 49-302;

Acts of 1936 (Spec. Sess.), Ch. 3, Sec. 31, as found in Burns' (1951 Repl.), Section 52-1130;

Acts of 1879, Ch. 3, Sec. 9, as found in Burns' (1950 Repl.), Section 22-116; and

Acts of 1955, Ch. 119, Sec. 17, as found in Burns' (1961 Supp.), Section 22-4617.

In summary, it is my opinion that the employment by a city of the unemancipated minor children of the secretary to the mayor and the airport manager is not contrary to law for the reason that said secretary and airport manager do not exercise any official jurisdiction within said city and further have no authority to perform an official act such as creating, passing upon, authorizing or approving the employment of said children.

OFFICIAL OPINION NO. 15

March 6, 1962

Mr. Edwin Steers, Sr., Member
State Election Board
108 East Washington Street
Indianapolis, Indiana

Dear Mr. Steers:

This is in answer to your recent letter wherein you request an Official Opinion, which is based on a letter from the Clerk of the Circuit Court of Jennings County, Indiana. The question is therein stated as follows:

“Is it permissible for elected officers or candidates for re-election or their deputies to register voters and be paid for registering them. The officers that I am

most interested in are namely: Sheriff, Auditor, Trustee.

“It has been customary in the past for the trustees to register as they assess.”

Your question involves a consideration of whether serving as a deputy registration officer, by any of the above designated officers, would constitute a violation of the Indiana Constitution, Art. 2, Sec. 9, which provides, in part, as follows:

“No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; *nor shall any person hold more than one lucrative office at the same time*, except as in this Constitution expressly permitted: * * *” (Our emphasis)

In my 1961 O. A. G., pages 173, 174, No. 30, it is stated:

“* * * To come within the constitutional prohibition against the holding of two lucrative offices, one must hold title to an office wherein he is authorized to exercise some of the state’s sovereignty and so is an officer rather than a mere employee. In addition, it is a necessary element of a ‘lucrative office’ that there be compensation attached for services rendered.

“Chambers v. The State *ex rel.* Barnard, Prosecuting Attorney (1890), 127 Ind. 365, 367, 26 N. E. 893, 11 L. R. A. 613;

“Book v. State Office Building Comm. *et al.* (1957), 238 Ind. 120, 151, 152, 149 N. E. (2d) 273.”

One of the offices considered in that Opinion was that of a township trustee, and my conclusion as to such office was stated on page 175, thereof, as follows:

“Therefore, in my opinion, the law is well settled that a township trustee is the holder of a ‘lucrative office’ within the meaning of the Constitution.”

An examination of the statutory powers and duties prescribed for county auditors and county sheriffs discloses the

OPINION 15

fact that the holders of such offices exercise a portion of the sovereignty of the state, and are thus holders of "lucrative offices" within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*.

Let us next consider whether a deputy registration officer is the holder of a "lucrative office" within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*. The authorization for the appointment of registration officers and deputy registration officers, together with other pertinent provisions relative to their appointment, the nature of their duties and the scope of their authority, are found in the Indiana Election Code, which is the Acts of 1945, Ch. 80, as amended. The particular sections, in point in this consideration include Sections 50, 53, 54 and 56, as amended, and found in Burns' (1961 Supp.), Sections 29-3406, 29-3409, 29-3410, and 29-3412. These sections may also be found in Election Laws of Indiana, 1960, issued under the authority of the State Election Board, pages 154 to 166 inclusive. Burns' 29-3406, *supra*, reads, in part, as follows:

"The clerk of the circuit court of each county, except in counties having a population of eighty thousand [80,000] or more * * * shall be ex officio the registration officer of such county and shall have full charge and control of the registration of voters within such county, and in counties having a population of eighty thousand [80,000] or more * * * a board of registration as hereinafter provided in this act shall have full charge and control of the registration of voters of such county. The clerk of the circuit court, except in counties having a population of eighty thousand [80,000] or more * * * and the board of registration in counties having a population of eighty thousand [80,000] or more * * * shall appoint as many deputy registration officers for the county as may be necessary, who, before entering upon the discharge of their duties, shall take an oath to be administered by the clerk of the circuit court or by a member of the registration board as the case may be that they will faithfully and honestly discharge the duties imposed upon them by law. * * * Deputy clerks of the circuit courts shall not by reason of their office be registration officers or have authority

to register voters and may only become such deputy registration officers upon appointment under the same recommendations as required by this section for the appointment of deputy registration officers. * * * *For their services as deputy registration officers, appointed by the clerk of the circuit court, or board of registration, each deputy registration officer shall be entitled to receive the sum of not to exceed ten cents [10¢] for each and every registration blank or transfer of registration which such registration officer delivers, properly filled out and executed, to the clerk of the circuit court of the county or to the board of registration in counties having a population of eighty thousand [80,000] or more * * ** Every deputy registration officer, shall, at all times, perform his duties, as prescribed in this act, subject to the direction, supervision and authority of the clerk of the circuit court, or of said board of registration. *For the purpose of this act, the clerk of the circuit court, or the members of the board of registration and every deputy registration officer appointed by the clerk of the circuit court, or by said board of registration, is hereby authorized to execute such affidavits and forms and take such acknowledgments as may be required by any of the provisions of this act. * * **" (Our emphasis)

The material content of Burns' 29-3409, 29-3410 and 29-3412, *supra*, as they pertain to the duties and authority of deputy registration officers may be summarized briefly, as follows: authority for such deputies to register or transfer registration of voters; enumeration of data and statements to be contained in affidavits and forms of registration; responsibility for proper preparation of affidavits of registration with the statements and information therein required and the authority of such deputies to administer oaths in connection with such registration duties.

It will be noted that Burns' 29-3406, *supra*, makes the clerk of the circuit court, on the basis of population of the county, *ex officio* the registration officer in Jennings County. In my opinion the deputy registration officers are included, insofar as registration duties are concerned, within the application of

OPINION 15

1 R. S. 1852, Ch. 28, Sec. 2, as found in Burns' (1951 Repl.), Section 49-502, which reads as follows:

“Such deputies shall take the oath required of their principals, and may perform all the official duties of such principals, being subject to the same regulations and penalties.”

It is also noted that Burns' 29-3406, *supra*, requires that each deputy registration officer subscribe to an oath before entering upon the discharge of his duties and that compensation is paid for the services of such deputy registration officers.

In the enactment of the Indiana Election Code the Legislature imposed certain additional duties upon the clerk of the circuit court and expressly provided that for such additional duties the clerk shall not be entitled to receive any compensation in addition to the clerk's compensation as now provided by law. The clerk of the circuit court, as *ex officio* registration officer or member of the board of registration is exercising a portion of the sovereignty of the state. A deputy registration officer acts for his principal and therefore can also be held to be exercising a portion of the sovereignty of the state. Such deputy registration officer supervises and assists in the preparation of the affidavit of registration which may be subscribed and sworn to or affirmed or certified to before such registration officer. Further, a deputy registration officer in examining applications for registration, in determining their qualifications and making allowance or rejection of their applications, in my opinion becomes an administrative officer exercising discretion and administrative power, and to such extent at least the nature of his duties are those of an officer of the state within the meaning of the word as commonly recognized.

The Supreme Court of Indiana, in the case of *Blue v. State ex rel. Brown* (1934), 206 Ind. 98, 188 N. E. 583, determined that a statute was not objectionable which required deputy registration officers to be selected as nearly as practical from the two political parties which cast the highest and the second highest vote for Secretary of State. This was determined on the theory that *these deputies are not public officers but temporary appointees* and therefore do not exercise rights and privileges to which every person is entitled. In 1947 the Su-

preme Court of Indiana, in the case of State *ex rel.* Buttz v. Marion Circuit Court *et al.*, 225 Ind. 7, 72 N. E. (2d) 225, approved the holding in the case of Blue v. State *ex rel.* Brown, *supra*, but stated at page 17:

“* * * *We do not, however, approve of the reasoning by which this holding was arrived at for, as we have heretofore pointed out, had these appointees been considered public officers the result should have been the same.*” (Our emphasis)

While the language in the 1947 opinion of the Supreme Court does not definitely establish deputy registration officers as public officers, it nevertheless presents a strong implication that such is the case.

The Legislature in enacting the Election Code must be presumed to have known that a clerk of the circuit court would normally appoint only persons of his political party as deputies of his office. A substantial number of voters' registrations are processed in the office of the clerk. The advantage that might be taken in favor of the political party of the clerk, is obvious. The requirement of Burns' 29-3406, *supra*, that deputy clerks of the circuit courts shall not, by reason of their office, be registration officers or have authority to register voters, and may only become such registration officers upon proper appointment, is in harmony and keeping with the expressed intent of having deputy registration officers appointed in *equal numbers from the two political parties* casting the highest and second highest votes for the Secretary of State. It should not be construed as authorizing the deputy to hold two separate and distinct offices. In view of the above, I am of the opinion that a deputy of the clerk of circuit court may serve as deputy registration officer, if properly appointed, but may not be additionally compensated for such services as a deputy registration officer.

The Legislature conferred no duties upon the offices of sheriff, auditor or township trustee in connection with the registration of voters. It is settled law in Indiana, that the offices of sheriff, auditor and township trustees are lucrative offices within the meaning of Art. 2, Sec. 9, of the Indiana Constitution. It follows, therefore, that duly appointed depu-

OPINION 16

ties of such offices would be, under the provisions of Burns' 49-502, *supra*, also considered lucrative offices and would also be prohibited from serving as deputy registration officers.

Therefore, it is my opinion that it is not permissible for elected officers or candidates for re-election or their deputies to register voters and be paid for registering them. Included are those officers and their deputies which you specifically enumerated, namely, sheriff, auditor and trustee.

OFFICIAL OPINION NO. 16

March 7, 1962

Hon. Anna Maloney
State Representative
131 East 5th Avenue
Gary, Indiana

Dear Representative Maloney:

Your letter of February 19, 1962 has been received in which you request an Official Opinion on the following question:

“Three days' absence per year may be granted to a teacher for reasons other than sickness but will be charged against sick leave and will not accumulate.

“For example: When negotiating on salaries, if a school board agrees to grant teachers one, two (or more) days' absence for personal business, and charge these days against sick leave, may it legally do so?”

The Teachers' Sick Leave statute is Acts of 1945, Ch. 231, Sec. 2, as amended by Acts of 1951, Ch. 293, Sec. 2, Acts of 1955, Ch. 179, Sec. 2, and Acts of 1959, Ch. 243, Sec. 1, as found in Burns' (1961 Supp.), Section 28-4333, the pertinent provisions of which read as follows:

“* * * Each teacher shall be entitled to be absent from work on account of illness or quarantine for a total of ten [10] days the first year and seven [7] days in each succeeding year without loss of compensation, and for death in immediate family for a period extending not more than five [5] days beyond such death. If in