

1982 WL 189323 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 11, 1982

**\*1 RE: § 8-5-10, South Carolina Code of Laws, 1976, as amended.**

Dr. Henry V. Sawyer  
Secretary  
South Carolina Board of Examiners in Optometry  
Post Office Box 1149  
Marion, South Carolina 29571

Dear Dr. Sawyer:

You have requested the opinion of this office whether the hiring of your daughter on a contractual basis for accounting and clerical work by the South Carolina Board of Examiners in Optometry, violates South Carolina's antinepotism statute. It is the opinion of this office that if you disqualify yourself from participating in any manner in the decision to hire or employ your daughter, the Board's contract with her for services will not violate [§ 8-5-10, Code of Laws of South Carolina](#), 1976, as amended.

The South Carolina State Board of Examiners in Optometry is a state regulatory agency created pursuant to [§ 40-37-40, of the South Carolina Code](#). You have been selected as secretary-treasurer of the Board pursuant to [§ 40-37-80 of the Code](#) and receive a salary for your work, however, there does not appear to be any authorization for you as secretary-treasurer to hire or appoint any person to work for the Board.<sup>1</sup> Thus, it appears that if your daughter is employed, the decision would have to be made by the Board.

South Carolina's antinepotism statute [[§ 8-5-10](#)] provides that:

It shall be unlawful for any person at the head of any department of this government to appoint to any office or a position of trust or emolument under his control or management any person related or connected with him by consanguinity or affinity within the sixth degree.

There is no doubt that your daughter is within the sixth degree of kinship, and if you were the appointing authority, her appointment to a position of trust or emolument by you would be prohibited. The issue presented is thus whether the Board of Examiners may employ a member's daughter on a part-time basis to perform accounting and clerical work for the Board.

South Carolina's antinepotism statute should be construed in light of its obvious purpose to discourage the practice of making appointments upon considerations other than merit. [State ex rel Robinson v. Keefe \(Fla.\) 149 So. 638; see also, Annot., 88 A.L.R. 1103](#) 'Construction, Application, and Effect of Constitutional or Statutory Provision Regarding Nepotism in the Public Service'. Although there is a scarcity of law defining the term 'person' as it is used in antinepotism statutes, it appears consistent with the statute's purpose to construe the term to include entities such as 'boards' or 'commissions' where they possess the power to appoint or hire. See, § 2-7-30, Code of Laws of South Carolina, 1976, as amended.<sup>2</sup> Such reasoning is supported in the extant case law.

In [State v. Whittle](#), (Mo.) 63 S.W.2d 101, the Missouri Court considered the applicability of the Missouri antinepotism provision in the state's constitution to appointments or employment made by a Board or Commission.<sup>3</sup> The Court concluded that the antinepotism provision was applicable to Boards and Commissions:

\*2 [The antinepotism provision] is directed against officials who shall have (at the time of selection) 'the right to name or appoint' a person to office. Of course, a Board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power) either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the [antinepotism provision].

See also, Barton v. Alexander, (Id.) 198 P. 470; Graham v. Hurley, (Mo.) 540 S.W.2d 20; contra, State ex rel Robinson v. Keefe, *supra*, (concurring opinion).

This conclusion is further supported by the South Carolina Court's decision in State v. Cumbee, 276 S.C. 207, 277 S.E.2d 146. The Cumbee decision may be construed as supportive of the proposition that § 8-5-10 should be broadly applied to persons with authority to appoint or employ people. In Cumbee, the Court determined that a magistrate is subject to the provisions of § 8-5-10, concluding only that a magistrate is a judicial officer of the state and therefore subject to the provisions of the section. Thus, in view of the foregoing you are advised that § 8-5-10 may be construed as making unlawful the Board's appointment of your daughter to a position of pay if you participate in that appointment by affirmative vote.

However, it would appear that § 8-5-10 does not make unlawful the appointment of your daughter by the Board, if you, as a Board member, disqualify yourself from participation in that decision and refrain from voting upon her appointment. Courts elsewhere have reasoned that antinepotism provisions do not prohibit the employment by a board of a relative to a board member if the related board member disqualifies himself from participation in decisions related to the employment. Graham v. Hurley, *supra*.

Such a construction appears to be most reasonable, and is consistent with the legislature's will as reflected in the ethics legislation. Section 8-13-460(c) of the Code provides, *inter alia*, for recusal of board members from any 'votes, deliberations or other actions' on matters where a potential conflict of interest exists.<sup>4</sup> The purpose of this state's ethics legislation is comparable in many ways to that of the antinepotism provision and these provisions merit similar consideration. Furthermore, official action by board members in the name of the board, after disqualification of one or more members, is generally recognized in South Carolina. Cf. Welch v. Getzen, 85 S.C. 156, 67 S.E. 294.

In summary, you are advised that the Board of Examiners in Optometry may contract with your daughter for accounting and clerical services provided that you do not participate in any way in the decision to hire or appoint her, or in any decision which would affect her employment with the Board. The fact that you serve as secretary-treasurer of the Board does not alter this conclusion.

Very truly yours,

\*3 Edwin E. Evans  
Senior Assistant Attorney General

#### Footnotes

- 1 The authority of the Board's secretary to hire or appoint persons for employment cannot be assumed. § 81-11-220(2) reads as follows: 'Appointing authority' shall mean any person having power by law, or by lawfully delegated authority, (cont'd on p. 2) to make an appointment for a person for employment to any position in the State service.  
You have provided no information that suggests the presence of any such authority in the Board's secretary.
- 2 'The words 'person' and 'party' and any other word importing the singular number used in any act . . . shall be held to include the plural and to include firms, companies, associations and corporations . . .'
- 3 Mo. Const. Art. VII, § 6 provides:  
Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.
- 4 Section 8-13-460 does not control the present situation in that it reaches only to matters affecting a 'member of (the official's) household'. 'Members of household' is defined to mean 'any person, his or her spouse, and any children occupying the same family residence'. § 8-13-20(f).

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