

1979 S.C. Op. Atty. Gen. 27 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-18, 1979 WL 29024

Office of the Attorney General

State of South Carolina

Opinion No. 79-18

February 1, 1979

**\*1 SUBJECT: Education: General**

(1) The State Superintendent of Education may promote a present employee of the State Department of Education who is related to him by consanguinity or affinity within the sixth degree without violating [§ 8-5-10 of the Code of Laws of South Carolina](#), 1976, the South Carolina anti-nepotism statute.

(2) [§ 8-5-10](#) prohibits the employment of certain individuals by heads of departments of government in South Carolina. This anti-nepotism statute does not prohibit promotion of persons within such degree of kinship who were employed by that department prior to the date such person became head of the department.

TO: Dr. Charlie G. Williams  
State Superintendent of Education

QUESTION:

May the State Superintendent of Education appoint a person who is related to him within the sixth degree, and who is an employee of long-standing with that Department, to the position of Deputy Superintendent of Education without violating the State's anti-nepotism statute?

STATUTES AND CASES:

[§§ 8-5-10; 59-3-30; Board of Commissioners of Colfax County v. Department of Public Health](#), 100 P. 2d 222, 44 N.M. 189; [Commonwealth ex rel. Maurer to Use of Braden v. O'Neill](#), 83 A. 2d 382, 368 Pa. 369; [Daub v. Coupe](#), 193 N.Y.S. 2d 47, 9 A.D. 2d 260; [Matter of McGuire](#), 2 N.Y.S. 762, 50 Hun. 203; [Morris v. Parks](#), 28 P. 2d 215, 145 Or. 481; [Rasmussen v. Board of Superintendents of Erie County](#), 25 N.Y.S. 2d 322, 175 Misc. 838; [Reddell v. State](#), 170 Pac. 273, 14 Okla. Crim. Rep. 199; [State ex rel. Robinson v. Keefe](#), 149 So. 638, 111 Fla. 701; 1965-6 Op. Atty. Gen., No. 2003, p. 64; [88 A.L.R. 70; Words and Phrases](#), 'Appoint.'

DISCUSSION:

On January 15, 1979, Mr. Sidney B. Cooper, Jr., was promoted by Dr. Charlie G. Williams, State Superintendent of Education, to the position of Deputy Superintendent of Instruction for the South Carolina Department of Education. Mr. Cooper was originally appointed Assistant State High School Supervisor in 1964 by Dr. Jesse T. Anderson, State Superintendent of Education. State Superintendent of Education Cyril B. Busbee promoted Mr. Cooper to Director of Federal Programs on July 28, 1972, a position he held until January 15, 1979.

Dr. Williams was originally appointed Director of the Division of Research, Surveys and Experimentation on March 15, 1967 by Cyril B. Busbee, State Superintendent of Education. Dr. Williams was promoted to Deputy Supervisor of Instruction on August 19, 1968 by Dr. Busbee. Dr. Williams assumed the post of State Superintendent of Education on January 10, 1979.

[§ 59-3-30\(3\) of the Code of Laws of South Carolina](#), 1976, empowers the State Superintendent of Education with the authority 'to organize, staff and administer the State Department of Education including such divisions and departments as are necessary to render the maximum service to public education in the state.' The selection of personnel in the State Department of Education is vested solely in the State Superintendent of Education and the State Board of Education is not authorized to confirm or reject personnel selection. See 1965-66 Op. Atty. Gen., No. 2003, p. 64.

**\*2** The question has arisen whether the promotion of Mr. Cooper, the first cousin of the State Superintendent, violates the State's anti-nepotism laws. [§ 8-5-10](#) provides:

It shall be unlawful for any person at the head of any department of this government to appoint to any office or 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.

It is clear that the State Superintendent of Education is the head of a department of state government. The term 'any office or position of trust or emolument,' as used in the context of this statute, includes the position of Deputy Superintendent of Instruction. The original Act, 1896(22) 123, was entitled 'An act to regulate the Appointment of Subordinate Officers in the several Departments of the State' and is in substance the same as the present act.

Nepotism has been defined as the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of their merit or ability. An anti-nepotism statute should be construed in the light of its obvious purpose to discourage the practice of making appointments upon considerations other than merit. See [State ex rel. Robinson v. Keefe](#), 149 So. 638, 111 Fla. 701, and other related cases in [88 A.L.R. 70](#). These statutes are designed to prevent the practice of elected officials appointing their relatives to subordinate positions and employments in their departments of state and municipal governments. [Reddell v. State](#), 170 Pac. 273, 14 Okla. Crim. Rep. 199.

The position of deputy superintendent of education for instruction is a classified position with the State Personnel System. The person employed is an employee of the State Department of Education, and not an officer of State Government, and his duties and responsibilities are defined by the State Superintendent of Education.

Whether or not the anti-nepotism statute is applicable in the factual situation presented depends upon the definition of the word 'appoint.' The word appoint has many definitions. See [Words and Phrases](#), 'Appoint.' The term has been held to be equivalent to 'employ' or 'hire.' [Morris v. Parks](#), 28 P. 2d 215, 145 Or. 481; [Board of Commissioners of Colfax County v. Department of Public Health](#), 100 P. 2d 222, 44 N.M. 189. 'Appointing' an employee has been distinguished from 'promoting' an employee. In [Daub v. Coupe](#), the New York Court of Appeals stated:

To 'appoint' is to designate or assign to a position, while to 'promote' is to advance or progress to a higher grade, position or degree; and 'promotion,' which cannot occur until there exists a condition or status from which there can be advancement or progress, is not to be equated with 'appointment' which creates or establishes conditions which can later be acted upon. [193 N.Y.S. 2d 47, 52, 9 A.D. 2d 260](#).

**\*3** This distinction has been recognized by other courts. [Matter of McGuire](#), 2 N.Y.S. 762, 50 Hun. 203; [Rasmussen v. Board of Sup'rs. of Erie County](#), 25 N.Y.S. 2d 322, 175 Misc. 838; [Commonwealth ex rel Maurer to Use of Braden v. O'Neil](#), 83 A. 2d 382, 368 Pa. 369.

It is clear that it would be unlawful for the State Superintendent of Education to initially employ his first cousin in this position. In the instant case, the cousin had been a public servant in a high level position in this department for many years. The Legislature, in our view, is condemning the practice of employing family members and encouraging the selection of employees on the basis of merit. The Legislature did not intend to prevent the promotion of qualified state employees, who, after their original

appointment to a position in state government, become related within the sixth degree to their newly elected department head. The term appointment must be construed in light of the obvious intent of the anti-nepotism statute.

#### CONCLUSION

Although there is no judicial definition of the term 'appointment' by South Carolina Law, it is the opinion of this Office that the term does not encompass promotions from within the various departments of state government. The nepotism statute, in our view, applies only to the initial employment of individuals related to the head of the department and does not apply to promotions within such department.

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