

OAG 15-009

April 16, 2015

Subject: Whether a person may be elected or appointed to a state college or university board of regents or trustees if that person has a relative already employed by the college or university

Requested by: Travis Powell, General Counsel
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Written by: Matt James

Syllabus: A person may be elected or appointed to a state college or university board of regents or trustees if that person has a relative who is employed by the college or university prior to the election or appointment of the regent or trustee.

Statutes construed: KRS 164.225; KRS 164.360; KRS 164.830

OAGs cited: OAG 97-27

Opinion of the Attorney General

Travis Powell, General Counsel for the Kentucky Council on Postsecondary Education, has requested an opinion of this office on whether a person may be elected or appointed to a state university board of regents or trustees if that person has a relative currently employed by the university. We advise that a person may be elected or appointed to a state college or university board of regents or trustees if that person has a relative who is employed by the college or university prior to the election or appointment of the regent or trustee.

KRS 164.321(1)(a) provides that “each board of the comprehensive universities shall consist of eight (8) members appointed by the Governor, one (1) member of the teaching faculty, one (1) member of the university nonteaching personnel, and one (1) member of the student body of the respective university or college.” KRS 164.321(6) provides the procedures for electing the teaching faculty member, KRS 164.321(7) provides the procedures for electing the nonteaching personnel member, and KRS 164.321(8) provides that the student body member shall be the student body president during the appropriate academic year. However, KRS 164.360(2) provides the restriction that “no person shall be employed at an institution where his relative serves on the board of regents for that institution.” KRS 164.001(20) defines a relative as “a person's father, mother, brother, sister, husband, wife, son, daughter, aunt, uncle, son-in-law, or daughter-in-law.” At issue is whether a person may be elected or appointed to a state college or university board of regents if that person has a relative who is already employed by the state college or university prior to the person's election or appointment.

In OAG 97-27, we addressed whether the amendment to KRS 164.360 establishing the anti-nepotism provision contained a “grandfather clause” for those that were employed at a state university prior to the appointment of a relative to the board of regents. We rejected “the suggestion that the word *shall* as used in KRS 164.360(2) creates an implicit grandfather clause” and advised that “KRS 164.360(2) must be construed to mean strictly what it says. It contains no exemptions of any kind.” *Id.* In subsequent informal opinions, we have retreated from this position, advising that a person may assume office as a regent if the person has a relative employed at the university prior to the regent's assuming office. The subsequent informal opinions relied on *Caudill v. Judicial Ethics Committee*, 986 S.W.2d 435 (Ky. 1998), decided after OAG 97-27. In light of *Caudill*, we now withdraw OAG 97-27, and advise that the anti-nepotism provision in KRS 164.320(2) does not apply to employment pre-existing the relative's election or appointment to the board of regents.

In *Caudill*, the court addressed the question of whether a judge may employ a spouse as a secretary, given the former Kentucky Code of Judicial Conduct Canon 3B(4), which provided that a judge “should exercise his power of appointments only on the basis of merit, avoiding nepotism and favoritism.” The court found that the anti-nepotism provision “does not prohibit judges from

hiring relatives The controlling requirement in this sentence is that appointments should be made based on merit.” *Caudill*, 986 S.W.2d at 436. The court explained its reasoning:

Favoritism based upon relationship is the evil to be eliminated through anti-nepotism provisions. It is the motivation and reasons for hiring which determine whether nepotism is involved, not merely the employment of a relative. Anti-nepotism provisions are aimed at avoiding inefficiency in public office by preventing officials from favoring their relatives and appointing those who may not be qualified to serve. “[A]dequate protection against appointments other than upon approved merits . . . is all that an ‘anti-nepotism’ law can constitutionally be supposed to cover”

Id. *Caudill* makes clear that anti-nepotism statutes protect against only appointment based on something other than merits. In *Chapman v. Gorman*, 839 S.W.2d 232 (Ky. 1992), the court found that “where relatives of board members were hired before the board members were elected to their posts . . . there is hardly any likelihood that favoritism was involved. Thus the intent behind the entire provision, to eliminate nepotism, is not activated.” *Id.* at 241. Both *Caudill* and *Chapman* are clear that the intent of anti-nepotism statutes is to protect against favoritism, and they are not triggered if the relatives were hired before the board members assumed office.

Further, the weight of authority from other jurisdictions supports the interpretation that anti-nepotism provisions do not apply to pre-existing employment. *Caudill* noted with approval that “other jurisdictions interpreting anti-nepotism provisions have held that such do not apply to continuation of employment when the initial hiring decision was based on merit.” *Caudill*, 986 S.W.2d at 437. Other state supreme courts have examined whether “employed” should be interpreted to apply to pre-existing employment in the context of anti-nepotism statutes, and have reached a conclusion directly opposite to OAG 97-27. See *Hinek v. Bowman Public Sch. Dist. No. 1*, 232 N.W.2d 72, 74 (N.D. 1975) (“Although we would agree that, as a general rule, the word ‘employed’ signifies both initial and continued employment . . . we are obligated to interpret that word to mean ‘hired’, which then limits us to initial employment only”); *New Mexico State Bd. of Educ. v. Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1*, 624 P.2d

530, 534 (N.M. 1981) (“We conclude from the foregoing that the intent of the Legislature is best reflected by construing the words ‘employ’ and ‘approve the employment’ to relate only to the initial hiring of teachers”). Further, other authorities have found that “an anti-nepotism statute which, if applied, would have the effect of terminating the employment of a person who was lawfully hired in the past runs afoul of the constitutional proscription against deprivation of liberty without due process of law.” 16D C.J.S. *Constitutional Law* § 1894; *Backman v. Bateman*, 263 P.2d 561 (Utah 1953); see also *New Mexico State Bd.*, 624 P.2d at 534 (“The interest of the State is to continue the employment of qualified and experienced personnel and not to terminate employment without ‘good and just cause’”). The weight of authority on the issue supports the claim that anti-nepotism statutes should not be interpreted to terminate pre-existing employment, and that to interpret them in such a manner would deprive the employee of property without due process of law.

Accordingly, OAG 97-27 is hereby withdrawn. A person may assume office as a state college or university regent if that person has a relative whose employment at the college or university predates the regent’s election or appointment without conflict. However, we further advise that KRS 164.360(2) still applies to employment after a person begins to serve on a board of regents; a person who has a relative currently serving on a board of regents may not begin initial employment at that institution.

As a further note, KRS 164.360(2) only applies to the universities governed by a board of regents under KRS 164.321. It does not apply to the University of Kentucky or the University of Louisville, which are governed by boards of trustees under KRS 164.131 and KRS 164.821 respectively. However, the University of Kentucky has its own anti-nepotism provision, KRS 164.225, which provides that “no relative of a board of trustee member shall be employed by the university.” The University of Louisville has an identical provision, KRS 164.830(1)(a), which provides that “no relative of a board of trustee member shall be employed by the university.” We advise that the analysis in this opinion extends to those provisions as well.

In summary, a person may assume office as a state college or university regent or trustee if that person has a relative whose employment at the college or university predates the election or appointment to the board of regents or trus-

tees. A relative of a person currently serving on a board of regents or trustees of a state college or university may not begin initial employment at that institution.

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