

unless a contrary intent clearly appears. *State v. Collier County, supra; State ex rel. Luning v. Johnson*, 72 So. 477 (Fla. 1916).

It is my opinion, therefore, that although Ch. 73-593, Laws of Florida, was passed subsequent to Ch. 73-172, Laws of Florida, and relates to a part of the subject matter of Ch. 73-172, the Central Pinellas Transit Authority nevertheless comes within the above prohibition of §13 of Ch. 73-172 [§200.061, F. S.], since that section is not repugnant to Ch. 73-593 insofar as the latter chapter relates to increases in levy of millage for the Central Pinellas Transit Authority. Once it has complied with the publication and the subsequent hearing requirements of §13 of Ch. 73-172, the authority may, subject to Ch. 73-593, increase its millage within the voter approved limits pursuant to §200.065(3)(b), F. S.:

(b) The taxing authority, after the public hearing has been held in accordance with the above procedures, may adopt a resolution or ordinance levying a millage rate in excess of the certified millage. . . .

Thus, the authority may increase its millage rate only by compliance with the conditions set out in Ch. 73-172, Laws of Florida, and in Ch. 73-593, Laws of Florida.

073-347—September 17, 1973

#### ANTINEPOTISM LAW

##### WHO MAY NOT BE APPOINTED; ACTS AS DE FACTO OFFICER

To: John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee

Prepared by: Sharyn Smith, Assistant Attorney General

#### QUESTIONS:

1. May a sheriff legally appoint a relative to the position of a deputy sheriff so long as the deputy would not receive compensation for his services?
2. Would the official acts performed by such deputy while serving under such appointment be legal and binding?

#### SUMMARY:

A sheriff who appoints a relative to the position of a deputy sheriff violates the Antinepotism Law even if the relative is serving without compensation. All official acts performed by such deputy are legal and binding in that he is a de facto officer.

#### AS TO QUESTION 1:

For purposes of the first question, three assumptions are made in regard to the queried appointment of a deputy sheriff: First, the appointee is otherwise in all respects legally qualified for appointment in accordance with §23.068, F. S., prescribing the qualifications for police officers; second, the appointment is to a position as a regular deputy sheriff and not as a special deputy sheriff; and, third, the appointment occurred after the effective date of the new Antinepotism Law, to wit, January, 1970. It must also be emphasized that the following is confined solely to the Antinepotism Law.

Section 116.111, F. S., commonly known as the Antinepotism Law, prohibits "public officials" from appointing or employing relatives to positions in agencies over which they have supervision or control. In pertinent part, §116.111(2)(a) states that:

A *public official* may not appoint, employ, promote or advance or advocate for appointment or employment or advancement, in or to a position in the agency in which he is serving or over which he exercises jurisdiction or control, any individual who is a relative of the public official. . . . (Emphasis supplied.)

A "public official" is defined at §116.111(1)(b) as an

. . . officer, including a member of the legislature, the governor and a member of the cabinet or employee of an agency *in whom is vested the authority by law, rule or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals* or to recommend individuals for appointment, employment, promotion or advancement in connection with employment with an agency. (Emphasis supplied.)

It is well settled that a sheriff is, in fact, a public officer and, therefore, comes under the above statutory definition. See *Blackburn v. Brorein*, 70 So.2d 293 (Fla. 1954); 47 Am. Jur. *Sheriffs, Police and Constables* §5. Sheriffs are given the power by law to appoint deputy sheriffs. Section 30.07, F. S., provides in pertinent part that "sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them. . . ." (Emphasis supplied.) Since sheriffs are public officials with the power to appoint deputy sheriffs, §116.111, *supra*, on its face, appears to prohibit the appointment of a sheriff's relative to the position of deputy sheriff if such appointment results in the employment of the relative. Since the title of §116.111 refers strictly to "restrictions on employments" of relatives, and a strict construction of the statute is mandated, see *State ex rel. Robinson v. Keefe*, 149 So. 638 (Fla. 1933), the question is one of whether or not a deputy sheriff is an employee for purposes of the new Antinepotism Law. Although it has been held that a deputy sheriff is an officer insofar as his status relates to Civil Service regulations, see *Blackburn v. Brorein*, *supra*, it has also been held that a municipal police officer is an *employee* of the city which hires him as well as being an officer. *Curry v. Hammond*, 16 So. 2d 523 (Fla. 1944). There can be no question that a deputy sheriff is in fact an officer insofar as his relationship to the public and official duties are concerned. The question under the Antinepotism Law concerns not his official duties or relationship to the public, but rather the deputy's relationship to his employer, the sheriff. The sheriff alone possesses the power to approve his deputies and indeed they may "be hired and fired as often as he changes his collar if he so desires." *Blackburn v. Brorein*, *supra* at 299 (Terrell J., dissenting). As such, the relationship between the sheriff and a deputy is one of employer to employee, and the prohibition on employments contained in the Antinepotism Law is applicable. Additionally, the Police Standards Act defines "police officer" at §23.061(1), F. S., as "any person *employed* full time by any municipality, this state or any political subdivision thereof." (Emphasis supplied.)

Before an individual can qualify as a deputy sheriff, he must meet the requirements of §23.068, *supra*, which relates to qualifications for employment of a police officer. For purposes of qualification for employment under §23.068, a deputy sheriff is, therefore, considered a police officer as well as an employee of the employing body which directly pays the salary of such deputy. See §§30.49 and 30.50, F. S. If for purposes of payment of salary and *qualifications* for employment a deputy is considered an employee, then it follows that for purposes of *restrictions* on employments as contained in the Antinepotism Law, a deputy should likewise be considered an employee.

In reaching this conclusion I am not unmindful of the decision rendered in *State ex rel. Robinson v. Keefe*, *supra*, which exempted school teachers with lifetime teaching certificates from the old Antinepotism Law, Ch. 16088, 1933, Laws of Florida. The reason for such an exemption was that the Legislature had, by other complete statute, provided a special system for the appointment and tenure of

employment of school teachers. No such safeguards presently exist as to the appointment and tenure of deputy sheriffs other than those contained in §§23.068 and 23.069, F. S., the Police Standards Act. The sheriff still retains absolute power over the tenure of employment of deputies. Such was not the case in *Robinson*, where a school board, as opposed to an individual, was responsible by contract for teachers' employments. Additionally, under the new Antinepotism Law, the legislature has expressly exempted school boards from the purview of the law, see §116.111 (1) (a) 6., while no such exemption appears as to the hiring of deputies by sheriffs.

The issue raised as to compensation has been previously discussed in a letter from this office dated March 15, 1972. In that letter I concluded that a public official may not regularly employ a relative to perform duties that otherwise would require the assistance of a paid employee, even though such relative serves without pay. Additionally, an opinion of one of my predecessors in office interpreting the former Antinepotism statute (Chapter 16088, 1933, Laws of Florida, carried forward as §116.10, F. S.) observed that the

... act appears to be designed to favor employments in public offices of the general public rather than the relatives of public officers. The employment of relatives, *even without compensation*, may have the effect of keeping others out of employment for pay and thereby defeat the purpose of the Act. Unnumbered Attorney General Opinion, February 9, 1934, Biennial Report of the Attorney General, 1933-1934, p. 578. (Emphasis supplied.)

Even though the aforementioned letter and the above opinion refer to "employments" as opposed to "appointments," the conclusion reached in regard to employments is equally applicable to appointments. The statutory language of §116.111, *supra*, clearly prohibits any public officer from appointing, employing, promoting, or advancing in or to a position in an agency in which the appointing officer exercises control, *any* individual who is a relative of the appointing officer. If such an appointment takes place the individual shall not be paid any compensation. The language of the statute covers all positions within the affected agency, paid as well as unpaid, and legislative purposes must be followed by the inclusion of unpaid as well as paid appointments within the statutory prohibition.

Your first question is answered in the negative.

#### AS TO QUESTION 2:

By the weight of authority, a person who enters office and undertakes performance by virtue of his appointment is an officer *de facto* even if he was ineligible for the office at the time of the appointment. *Huff v. Sauer*, 68 N.W.2d 252 (Minn. 1955); *Ex Parte Register*, 60 So. 2d 41 (Ala. 1952); *Borough of Pleasant Hills v. Jefferson*, 59 A. 2d 697 (Pa. 1948); *Brown v. Anderson*, 198 S.W.2d 188 (Ark. 1946); *Rowan v. Board of Education of Logan County*, 24 S.E.2d 583 (W.Va. 1943); *May v. City of Laramie*, 131 P.2d 300 (Wyo. 1942); *Kemble v. Binder*, 196 A. 409 (Md. 1938); *Alabama & V. Ry. Co. v. Bolding*, 13 So. 844 (Miss. 1891). *See also* *Wade v. United States*, 158 U. S. 232 (1894); *DeJan v. DeJan*, 18 F. 2d 690 (5th Cir. 1927). Additionally, the actions of the *de facto* officer must be calculated to induce people without inquiry to suppose he is the officer. *Edwards v. Tippet*, 134 So. 52 (Fla. 1931). *Accord: Malone v. Howell*, 192 So. 224 (Fla. 1939). It has been held that:

Where one acts as a deputy sheriff with the consent, approval, and acquiescence of the sheriff, who holds him out to the public as his deputy, his acts as such deputy, although . . . not legally qualified as a deputy sheriff, are acts of a deputy sheriff *de facto* and possess the same legalty as the acts of a legally appointed deputy sheriff. . . .

(citation omitted.) [Powell v. Fidelity and Deposit Co. of Maryland, 163 S.E. 239 (Ga. 1932)]

The aforementioned principles are founded upon logical and just considerations which serve to safeguard the public interest and have been summarized as follows:

The *de facto* doctrine was introduced into the law, as a matter of policy and necessity, to protect the interests of the public and individuals, where interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices, under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts, as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid. [State v. Carroll, 38 Conn. 449, 467.]

A situation analogous to the question presented in the instant case arose in *McCreary v. Major*, 22 A.2d 686 (Pa. 1941), where a city council appointed one of its members to a board formed by the council. Even though the appointment was held to be violative of public policy and void, the acts of the disputed appointee performed under color of authority were valid in respect to the public.

It should be noted also that, even though the deputy sheriff is ineligible to hold the office, his title to the office and his authority to act as a *de facto* officer cannot be attacked collaterally by third parties. *Treasure, Inc. v. State Beverage Comm.*, 238 So. 2d 580 (Fla. 1971). An office which is filled by an appointee who is exercising the functions of the office *de facto* and under color of title, may only be challenged in a court of law in a *quo warranto* proceeding. *Swoope v. City of New Smyrna*, 125 So. 371 (Fla. 1929); Fla. RCP 670.

Thus, even though the appointment by a sheriff of a relative to the position of deputy sheriff violates §116.111, F. S., the official acts performed by such deputy while serving under color of office are those of a *de facto* officer and, therefore, are valid. *State v. Murphy*, 13 So. 705 (Fla. 1893). "All official acts of a *de facto* officer are valid as if he is an officer *de jure* and no question can be raised as to them." *State v. Wischart*, 28 So. 2d 589 (Fla. 1946).

073-348—September 17, 1973

#### SUNSHINE LAW

#### APPLICABILITY TO JUDICIAL NOMINATING COMMISSIONS

To: John J. Blair, State Attorney, Sarasota

Prepared by: Jan Dunn, Assistant Attorney General

#### QUESTION:

Are judicial nominating commissions subject to the Sunshine Law, §286.011, F. S.?

#### SUMMARY:

Judicial nominating commissions are not subject to the Sunshine Law.