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January 20, 1951
Op. No. 51-25 ✓

Mr. Wes Polley
Cochise County Attorney
Cochise County Courthouse
Bisbee, Arizona

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Dear Mr. Polley:

It looks like you are having a hard time getting your letter of December 12, 1950 completely answered. It appears that in the first instance your letter got covered up and was not acted upon for some time, then Mr. Wilson sent you a copy of an opinion written by Mr. Ling of this office about three years ago which he thought would answer the question propounded by your County School Superintendent, and then asked me to answer your specific question regarding the Juliani case. I had the opinion on your question prepared before we got your letter stating that Miss Fulghum requested that you answer each of the questions specifically. So we permitted the other opinion to go through and decided to write answers to the County School Superintendent's questions as specifically as we can.

We believe that Mr. Ling's reasoning in his letter of April 24, 1947 is sound and that Section 56-105 ACA 1939 is controlling on the employment of all public employees, including all school employees, from a practical viewpoint at least. Miss Fulghum has written as follows:

"In the past I have been advised that under section 54-416 of the Arizona Code, Annotated 1939, a board of trustees of a school district could employ a relative of a board member only if the vote for employment were

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unanimous. Also, I have been advised that under section 56-105 the person voting for the employment of a relative is guilty of a misdemeanor and subject to a fine but if the voucher were signed by all board members, the county school superintendent had no alternative but to pay the relative so employed and the member voting for his relative had assumed full responsibility for the act. Does the superintendent assume responsibility for this illegal act by paying the relative of the board member? Can the superintendent refuse to pay such debts assumed by the board in unanimous agreement?"

In order to answer these questions completely it will be necessary to not only go into the history of the enactment of Section 54-416, and Section 56-105 supra, but also the amendments to them and the wording of the same, also court decisions. We find that Section 54-416 regarding the employment of school trustees' relatives has the same thought in it now as was written into the law in the 1913 Code. This particular part of the Code was revised by Section 1011 of the Revised Code of Arizona, 1928, to read as follows:

" * * * No relative by affinity or consanguinity within the second degree of any trustee, or the husband or wife of a trustee, shall be employed in the district where he is a trustee, except by the unanimous consent of the board,
* * * "

and the same wording is contained in the present law, as amended, by Chapter 110 of the Session Laws of 1949. Although there has been a number of amendments and additions to Section 54-416, supra, this particular part has not been materially amended. For that reason any law made subsequent to 1928 that supersedes or repeals this law would take precedent

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over Section 54-416 which we consider Section 56-105 does, insofar as it is inconsistent with Section 54-416. We cite you in this instance Section 2017, Volume 1 of the Third Edition of Sutherland's Statutory Construction, and in that connection the case of Yakima Amusement Co. v. Yakima County, et al, 73 P. 2d 519, wherein the court said:

"An amendatory statute which sets out in full all the statute as amended is intended to contain becomes as substitute for the statute amended but does not necessarily abrogate it for all purposes, and so much of the original as is repeated in the later statute without substantial change is not repealed and re-enacted, but is continued in force without interruption from the time amended statute was enacted."

Another and later Oregon case, Noonan v. City of Portland, 88 P. 2d 808, the court said:

"In absence of clear indication to contrary, a statute incorporated within an amendatory act, without any substantial or material change in its phraseology, takes its antiquity from its original enactment and is neither deemed repealed nor re-enacted by being incorporated in the amendatory act."

This then places the employment of school employees by school trustees, legal or illegal, in accordance with the terms of Section 56-105, ACA 1939 because it was enacted by the Legislature in 1931, several years after the revision of the Code in 1928, and is a completely new law. We desire to quote a portion of this law, which is pertinent to the question and provides that a trustee may commit two offenses in the

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employment of teachers.

"It shall be unlawful for any executive, legislative, ministerial or judicial officer to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree, * * *"

This then just prohibits the trustee to appoint or vote for a relative within the third degree. It does not prohibit the other two board members from employing a relative of the non-voting trustee of any degree of relationship. The other unlawful act designated by Section 56-105 is as follows:

" * * * or to appoint, vote for, or agree to appoint, or to work for, suggest, arrange, or be a party to the appointment of any person in consideration of the appointment of a person related to him as aforesaid.
* * *"

Thus we see this doesn't prohibit a trustee from working to get his relative appointed by the other two members, unless he does it in consideration that he in turn will appoint a relative of one or both of the other trustees. In other words, the inhibition seems to be there must not be a conspiracy whereby one official will appoint another's relative in consideration of getting one of his relatives appointed by the other officials. This is a crime that the trustee may commit, but says nothing about the employee being guilty of anything, or the contract of employment being illegal or unenforceable. Section 54-416, supra, does not provide a penalty for a trustee voting for his relative within the second degree nor does it say what would be the rights of the employee or the district. These could only be determined by the general law. Our courts have ruled on many fact situations touching the questions raised by the County Superintendent. We cite a few: 20 Ariz. 314; 52 Ariz. 291 and 53 Ariz. 60-70.

Getting back now to the first specific question of the School Superintendent, which is:

"Does the superintendent assume responsibility for this illegal act by paying the relative of the board member?"

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The School Superintendent is assuming that the employment of the teacher was illegal, although it may not be. We have not been given the facts nor have we been asked to rule on that point, but are answering the question assuming as the County School Superintendent has done, that the employment was illegal.

It appears to us that the illegal act, if it is one, does not reach to the payment of the employee, but to the punishment of the official for making the appointment. It is therefore our opinion that the superintendent does not assume responsibility for making payments of vouchers regularly on their face.

Answering her second specific question:

"Can the superintendent refuse to pay such debts assumed by the board in unanimous agreement?"

Taking into consideration all of the above, it is our opinion that the County School Superintendent cannot refuse to pay such debts assumed by the board in unanimous agreement.

The County School Superintendent's next question is:

"At the last school trustee election in one district a relative of a teacher was elected and will go into office in January. This teacher has a contract with the old board on which she had no relative. Cannot she legally draw her salary for the term for which she was employed by the board now in power or must we refuse to pay her after the January meeting for organization of the school board on which her relative will serve as a member?"

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We do not feel that it will be necessary to enlarge on what we have said before in order to properly answer this question and will say that it is our opinion from several standpoints that the teacher mentioned in this question can legally draw her salary and the County School Superintendent should pay her the same as formerly, even if the voucher is signed by her relative.

We trust that we have answered each and every point specifically and that you will have no further trouble on these particular matters.

Very truly yours,

FRED O. WILSON
Attorney General

CHAS. ROGERS
Assistant Attorney General

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