

money for holding a presidential primary election does not relieve local units of government from the responsibility of paying for the cost of holding the election. In so deciding, the Court stated:

" . . . As long ago as 1890 the Michigan Supreme Court considered an election law which required expenditure of money but did not provide for payment of such expenses. The opinion states:

" 'It is of no consequence that expense must be incurred, and that the statute is silent upon the question of payment. Whenever an active duty is imposed upon municipalities, or public officers representing municipalities, the duty imposed carries with it the obligation on the part of the municipality to perform the act, bear the expense, and provide for its payment. We find nothing in the above provisions which is unconstitutional, and not within the exclusive province of the Legislature.'

"*Common Council of the City of Detroit v Rush*, 82 Mich 532, 542, 543 (1890)."

FRANK J. KELLEY,
Attorney General.

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COUNTIES: Control of county board of commissioners over county officers and employees

OFFICERS AND EMPLOYEES: Political participation by county officers and employees

HOME RULE CITIES: Political participation by employees

Apart from its control of the county budget, a board of county commissioners has no control over the selection, dismissal or conditions of employment of elected county officials.

A personnel policy adopted by a board of county commissioners does not apply to elected county officials or to deputies and employees of elected county officials.

A personnel policy adopted by a board of county commissioners prohibiting county employees from running for a partisan political office is valid. Such a policy, however, applies only to county employees subject to the supervision of the board.

A city charter provision prohibiting discrimination against employees for political reasons or affiliations does not invalidate a civil service rule that prohibits candidacy for public office by a city employee.

Opinion No. 5046

June 10, 1976.

Hon. Jerome T. Hart
Chairman
Senate Appropriations Committee
The Capitol
Lansing, Michigan 48901

Hon. James E. O'Neill, Jr.
Hon. Donald J. Albosta
State Representatives
The Capitol
Lansing, Michigan 48901

You have asked for my opinion regarding a Saginaw County Board of Commissioners personnel policy adopted in 1974 and covering employees of the county. Rule 8.2 of the policy provides:

"Coercion for political purposes of and by employees and use of their positions for political purposes shall be prohibited. *Running for partisan political office is prohibited*; however, an employee may request a leave of absence for the purpose of running for political office. If elected to such office, employment shall be terminated."
[Emphasis added]

You advise that subsequent to the adoption of said policy a controversy arose concerning the applicability of Rule 8.2 to specific employees of Saginaw County, and Saginaw County's civil legal counsel has ruled that the prohibition on partisan political candidacy does not apply to elected county officials or employees of elected county officials. According to this ruling, however, the prohibition does apply to all employees hired and employed by county agencies such as the Saginaw County Board of Health. You request my opinion on the following questions:

1. Was the Saginaw County civil legal counsel correct when he ruled that the prohibition on partisan political candidacy found in Rule 8.2 of the Saginaw County personnel policy applies to employees of county agencies but not to employees appointed by elected officials?
2. What are the prohibitions on partisan political candidacy which apply to county employees whose positions are partially or totally federally funded?

Subsequent correspondence directed to me by Senator Hart has revealed a third question:

3. Is § 91 of the charter of the City of Saginaw which proscribes candidacy for elective office by city employees constitutional, and is § 91 of the charter in conflict with § 13, as amended, of 1935 PA 78, MCLA 38.513; MSA 5.3363?

At the outset, it must be noted that prohibitions on partisan political activity by governmental employees are constitutional notwithstanding the fact that such prohibitions restrict the types of political activity in which governmental employees may participate. Such prohibitions have been held to serve compelling state interests. *United Public Workers of America v Mitchell*, 330 US 75; 67 S Ct 556; 91 L Ed 754 (1947); *US Civil Service Commission v National Association of Letter Carriers, AFL-CIO*, 413 US 93 S Ct 2880; 37 L Ed 2d 796 (1973); *Broadrick v Oklahoma*, 413 US 601; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

Because restrictions on political activity such as those found in Rule 8.2 of the Saginaw County personnel policy are constitutional on their face, the major issue to be resolved in answer to question (1) is whether such policy may be applied to employees of county agencies but not to employees appointed by elected officials. Const 1963, art 7, § 8, provides:

"Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law.*"

1851 PA 156, § 11, as amended, MCLA 46.11; MSA 5.331, confers upon Boards of County Commissioners the power:

" . . . To represent their respective counties and to have the care and management of the property and business of the county in all cases where no other provisions shall be made:

* * *"

In *Wayne County Civil Service Commission v Wayne County Board of Supervisors*, 22 Mich App 287; 177 NW2d 449 (1970), *rev'd* in part on other grounds, 384 Mich 363; 184 NW2d 201 (1971), the Michigan Court of Appeals held that the above-quoted statutory provision empowers a Board of County Commissioners to deal with personnel matters. The Court held that although the Board of Commissioners does not have all of the identifying characteristics of an employer, the Board does have supervisory power over personnel policies affecting county employees. The Court stated:

" . . . The board of supervisors—in carrying out its statutory function (MCLA § 46.11 [Stat Ann 1969 Cum Supp § 5.331]) of having the "care and management of the property and business of the county in all cases *where no other provisions shall be made*" (emphasis supplied) have the right and responsibility to carry out the requirements of Act 379 [the public employee relations act, 1965 PA 379, MCLA 423.201 *et seq*; MSA 17.455(1) *et seq*] as to determining adequate bargaining units and the recognition of exclusive agents of employees and may utilize a vehicle such as the labor relations board to investigate and recommend appropriate action to the board of supervisors." [22 Mich App at 300]

Based upon the above analysis, I am of the opinion that the Saginaw County Board of Commissioners does have the power to adopt a personnel policy for county employees.

Because Rule 8.2 of the Saginaw County personnel policy is constitutional and because the Board of Commissioners of Saginaw County has the power to adopt such a policy, the sole issue remaining with respect to your first question is the scope of the personnel policy. The policy applies only to employees of the county over whom the Board of Commissioners has some supervisory control. At the outset, it must be noted that elected officers of the county—such as the prosecuting attorney, county clerk, county treasurer—are officers of the county, and are not employees. See OAG, 1955-1956, No 2122, p 294 (May 25, 1955). As a result, the personnel

* 1851 PA 156, § 1, MCLA 46.1; MSA 5.321, was amended by 1974 PA 187, and the latter act substituted references to commissioners and county boards of commissioners for references to supervisors and boards of supervisors throughout the section. As a result, the legislative body of a county will hereinafter be referred to as the Board of County Commissioners.

policy adopted by the Saginaw County Board of Commissioners does not apply to elected officials.

Const 1963, art 7, § 4, provides:

“There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure.” [Emphasis added]

A review of the various statutes, judicial decisions, and opinions of this office concerning employees of elected county officials reveals that the County Board of Commissioners has no supervisory control over employees of elected officials. The Board of County Commissioners is empowered only to appropriate funds to elected officials for the hiring of employees by such officials and to establish the salaries of such employees. OAG, 1949-1950, No 862, p 71 (December 17, 1948). Each elected county official has been given the power by statute to select and appoint employees who serve at the pleasure of the elected official. RS 1846, chap 14, § 63, as amended, MCLA 50.63; MSA 5.833 (deputy county clerks); RS 1846, chap 14, § 37, as amended, MCLA 48.37; MSA 5.683 (deputy county treasurers and other employees of the county treasurer); RS 1846, chap 14, § 70, as amended, MCLA 51.70; MSA 5.863 (deputy sheriffs); 1925 PA 329, § 1, MCLA 49.31; MSA 5.791, and 1911 PA 41, § 2, MCLA 49.42; MSA 5.802 (assistant prosecuting attorneys and employees of the prosecuting attorney); RS 1846, chap 14, § 91, MCLA 53.91; MSA 5.893 (deputy registrar of deeds).

The above-cited statutes empower the various elected county officials to appoint deputies. A deputy, who is empowered by statute to act for the elected official, is not an employee but is, instead, an official. See OAG, 1943-1944, No 0-2992, p 153 (December 22, 1944). In 3 McQuillin, *Municipal Corporations*, Third Edition, 1973 Revised Volume, § 12.33, p 189, it is stated:

“One authorized by an officer to exercise the office or rights which the officer possesses, for and in place of the latter, is generally said to be a deputy. In other words, he is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. His term of office is limited by that of his principal, and he may be subject to removal within that time, dependent upon what the law provides. If the principal resigns before his term of office has been completed, the deputy does not ordinarily succeed to the office, although it may be incumbent upon him to perform the duties of the principal until the latter's successor is elected or appointed. Likewise, where the principal is unable for any reason to perform the duties of his office, it devolves upon the deputy to do so. However, his duty to perform the functions of his principal is not dependent upon the latter's absence or disability to act, for the prin-

principal, even though present, may command the deputy to perform such functions.

"Since he possesses, generally speaking, all the powers of his principal, he is not equivalent to a mere assistant. And being authorized to act for and in place of his principal, he is, of course, a public officer. If the law does not authorize one holding a position to do so, he is not a deputy but a mere employee.

" . . . Ordinarily a deputy is spoken of as an officer as distinguished from a mere employee, especially where his position is held by virtue of statute and where his duties are prescribed by law. But the designation is otherwise where a special deputy is appointed for a particular purpose. He is then held to be the personal representative of the officer." [3 McQuillin at 189-190; Emphasis added]

Thus, deputy sheriffs, deputy county clerks, deputy registrars, and deputy treasurers are not employees of the county, but are, instead, county officials. In OAG, 1949-1950, No 985, p 231 (June 2, 1949), it was held that deputy sheriffs are agents of the sheriff and have the authority to act for and in place of the sheriff, and the Board of Commissioners did not have the authority to appoint or discharge deputy sheriffs or designate their duties. Similarly, in *Eaton County Deputy Sheriffs Association v Eaton County Sheriff*, 37 Mich App 427; 195 NW2d 12 (1971), the Michigan Court of Appeals held:

*" . . . MCLA § 51.70 (Stat Ann 1971 Cum Supp § 5.863) provides that 'each sheriff may appoint one or more deputy sheriffs at his pleasure, * * *'. In our opinion this gives the sheriff of each county the power to prescribe the rules and regulations where by [sic] employment as a deputy may be continued."* [37 Mich App at 429; emphasis added]

Although assistant prosecuting attorneys are not designated as deputies of the prosecuting attorney, it has been held that the Board of Commissioners merely has budgetary control over the selection of employees of the prosecuting attorney. In OAG, 1949-1950, No 862, p 71 (December 17, 1948), it was held that the Board of Commissioners has the power to determine the number of assistant prosecuting attorneys which may be employed by the prosecuting attorney. However, the Board has no selection or appointment power with respect to such assistants. Similarly, in OAG, 1949-1950, No 877, p 99 (January 18, 1949), it was held that the Board of Commissioners must authorize the position of investigator for a prosecuting attorney. The Board has no function, however, beyond the authorization of the position. The selection is made solely by the prosecuting attorney.

Thus, based upon the above analysis, it is my opinion that the Board of County Commissioners has no control over the selection, dismissal, or conditions of employment of employees of elected officials. The only power which the county commissioners have with respect to personnel of elected officials is budgetary power. That is, the board may designate the number of employees which an elected official may hire and the salaries

of such employees. Therefore, in my opinion the personnel policy adopted by the Saginaw County Board of Commissioners does not apply to employees of elected county officials because the board has no supervisory control over such employees.

However, the Board of County Commissioners does have the power and authority to adopt a personnel policy which applies to employees of the county who are subject to supervision of the board. If the board selects the employees or the individuals who select the employees, the personnel policy of the board applies.

For example, 1957 PA 185, § 1 *et seq.*, as amended, MCLA 123.731 *et seq.*; MSA 5.570(1) *et seq.*, authorizes the establishment of a department and board of public works in counties in this State. Section 2 of the Act, MCLA 123.732; MSA 5.570(2), provides:

“ . . . *The department of public works shall be under the general control of the county board of commissioners and under the immediate control of the board of public works consisting of 3, 5, or 7 members who shall be appointed or removed by the county board of commissioners. . . .*” [Emphasis added]

Section 6, as amended, of the Act, MCLA 123.736; MSA 5.570(6), empowers the Board of Public Works, the members of which have been appointed by the Board of County Commissioners, to hire a director of public works and other necessary employees. Although the Board of Commissioners is not given any direct responsibility for the selection of employees by the Department of Public Works, the Board does have supervisory control over the selection of such employees because it is vested with supervisory control over the Board of Public Works.

Similarly, 1951 PA 156, § 13b, as amended, MCLA 46.13b; MSA 5.336, empowers the Board of Commissioners to appoint a County Controller or Board of Auditors. In OAG, 1947-1948, No 808, p 745 (June 23, 1948), it was held that the Board of Commissioners may hire employees to assist the County Controller. The County Board of Commissioners has similar control over the selection of the County Purchasing Agent and employees of the Agent, 1851 PA 156, § 13a, as amended, MCLA 46.13a; MSA 5.335.

A final example of the type of control which the County Board of Commissioners has over the selection of employees of county departments may be found by reference to the statute which establishes the county Department of Health, 1927 PA 306, § 1 *et seq.*, as amended, MCLA 327.201 *et seq.*; MSA 14.161 *et seq.* Section 1 of the Act, *supra*, requires the Board of County Commissioners of each county to establish a County Department of Public Health. The Board of County Commissioners is given the power to appoint the members of the County Health Board. The County Health Board is then given the power to select a County Health Officer, 1927 PA 306, § 3, as amended, MCLA 427.203; MSA 5.570(3). The County Health Department under the jurisdiction of the County Health Board is, then, empowered to select employees for the Department, 1927 PA 36, § 5, as amended, MCLA 327.205; MSA 5.570(5). In OAG, 1973-1974, No 4825, p 174 (August 14, 1974), it was held that the County Health Board has the authority to retain and release employees and to negotiate labor

contracts with its employees. Such negotiated labor contracts were held to be subject to the approval of the County Board of Commissioners because of the power conferred upon the Board of Commissioners to create positions and to specify remuneration, 1851 PA 156, § 11, MCLA 46.11; MSA 5.331. In this opinion, it was noted that the power to select, appoint, and control employees is vested in the County Health Board as opposed to the County Board of Commissioners. As a result, it might appear that the power of the County Board of Commissioners over employees of the County Department of Public Health is more similar to the power which the Board of Commissioners has over employees of elected officials as opposed to employees of county departments. That is, the Board of Commissioners only has the power to create positions and establish remuneration. However, because the Board of Commissioners appoints the members of the Board of Public Health, the Board of Commissioners does have control over the body which is responsible for the selection of employees for the Department of Public Health. As a result, the Board of Commissioners does have the power to establish a personnel policy for such employees.

Based upon the above analysis, the answer to your first question is that Rule 8.2 of the personnel policy adopted by the Saginaw County Board of Commissioners is constitutional, and it is within the power of the Board of Commissioners to adopt such a policy.

Question (2) deals with the role of the United States Civil Service Commission in establishing political activity rules for county employees.

5 USC §§ 1501-1508 regulates the political activity of state and local employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, 5 USC § 1501(4). This statute does not apply to elected officials, 5 USC § 1502(c)(3), see *Northern Virginia Regional Park Authority v US Civil Service Commission*, 437 F2d 1346 (CA 4, 1971), *cert den* 403 US 936; 91 S Ct 2254; 29 L Ed2d 717 (1972). 5 USC § 1502 specifically prohibits candidacy for partisan elective office by state or local employees as such term is defined in 5 USC § 1501(4). However, state or local officers or employees may be candidates for non-partisan political office, 5 USC § 1503.

The United States Civil Service Commission has promulgated Civil Service Regulations dealing with Political Activity of State or Local Officers or Employees, 5 CFR § 151.101 *et seq*, pursuant to the authority conferred upon the Commission by 5 USC § 1302, §§ 1502-1508.

State or local governmental units which receive Federal funding must adhere to the above restrictions as a condition for receipt of such funds. 5 USC § 1506(a) provides in relevant part:

“When the Civil Service Commission finds —

“(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Commission that he has violated section 1502 [prohibition on candidacy for political office] of this title and that the violation warrants removal; or

"(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency;

"the Commission shall make and certify to the appropriate Federal agency an order requiring that agency to *withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation. . . .*" [Emphasis added]

Thus, the answer to Question (2) is that the Federal statutes and regulations discussed above apply to employees of Saginaw County whose positions are partially or totally funded by loans or grants from the United States Government or a Federal agency. However, the applicability of the statutes and regulations discussed above to any particular present employee of Saginaw County must be determined by the United States Civil Service Commission. As a result, I recommend that if there are any questions concerning the applicability of the Federal guidelines and statutes to any specific employee in Saginaw County, the office of the General Counsel of the United States Civil Service Commission should be consulted.

Question (3) does not deal with Rule 8.2 of the personnel policy adopted by the Saginaw County Board of Commissioners. Instead, it deals with § 91 of the City Charter of the City of Saginaw, which provides:

"No person in default to the city shall be eligible for election or appointment to any city office. No officer or employee shall hold any remunerative elective or appointive office outside of the city government except notary public or supervisor. *No officer or employee shall be a candidate for any elective office* or a member of any committee or similar organization of any political party or participate actively in partisan politics, except that a councilman may be a candidate to succeed himself." [Emphasis added]

An individual who is presently a sergeant in the City of Saginaw Police Department desires to be the Democratic candidate for Sheriff of the County of Saginaw. He has been informed that such candidacy would be a violation of § 91 of the City Charter; if he pursues his candidacy, disciplinary action will be taken.

You have requested that I review the constitutionality of § 91 of the City Charter and that, in addition, I determine if this section is in conflict with 1935 PA 78, § 13, as amended, MCLA 38.513; MSA 5.3363. As was discussed above, a governmental body may constitutionally prohibit partisan political candidacy by employees of that body, *United Public Workers of America v Mitchell, supra*; *US Civil Service Commission v National Association of Letter Carriers, AFL-CIO, supra*; *Broadrick v Oklahoma, supra*. Although § 91 of the Saginaw City Charter might be construed to prohibit non-partisan candidacy as well as partisan candidacy, the specific factual situation in which this issue has arisen involves a city employee who desires to run for partisan political office. As a result, the constitutionality of § 91 as applied to non-partisan candidacy by city employees need not be determined at this time.

1935 PA 78, § 1 *et seq.*, as amended, MCLA 38.501 *et seq.*; MSA 5.3350 *et seq.*, empowers cities, villages and municipalities to establish a civil service system for fire and police departments. The City of Saginaw has, in fact, adopted a civil service system for the fire and police department. Section 13 of the Act, MCLA 38.513; MSA 5.3363, provides in relevant part:

“No person shall be reduced in pay or position, laid off, suspended, discharged or otherwise discriminated against by any appointing officer for religious or political reasons or affiliations. . . .”

You have requested that I determine whether § 91 of the City Charter, which prohibits candidacy for public office by city employees, is in conflict with § 13, which prohibits an appointing officer from discriminating against any employee for political reasons or affiliations.

It is my opinion that § 91 of the City Charter does not conflict with § 13 of 1935 PA 78, *supra*. The purpose of § 13, *supra*, is to protect classified employees of the police and fire departments from disciplinary action taken by reason of the political affiliations of such employees. As a result, said section was enacted to prevent the development or retention of partisan and political police and fire departments. Section 91 of the City Charter, to the extent that it prohibits partisan political candidacy by employees of the police or fire department, is consistent with the purpose of § 13 of 1935 PA 78.

Thus, the answer to Question (3) is that § 91 of the city charter of the City of Saginaw is constitutional and is not in conflict with 1935 PA 78, § 13, *supra*.

I recognize that the fact that elected officers, their deputies and their employees are permitted to run for a partisan political office while, at the same time, employees supervised by the board of commissioners may not run for partisan political office appears to treat persons similarly situated in a different fashion. However, the fact that each of these groups of individuals is subject to supervisory control by a different employer makes this difference in treatment legally permissible. For example, employees of two different school districts in the same county may have entirely different salary structures and fringe benefit programs, their emoluments being attributable to the employee's bargaining power as well as the attitude and financial resources of the different school boards. See *Governor v State Treasurer*, 390 Mich 389; 212 NW2d 711 (1973).

I would point out, however, that this apparent inequity may be corrected by the legislature if it chooses to amend the provisions of the county employees civil service act, 1941 PA 370, MCLA 38.841 *et seq.*; MSA 5.119(1) *et seq.* The statute currently authorizes adoption of county civil service for any county now or hereafter having a population of 1,000,000 or more. The legislature could reduce or eliminate the population requirement and thus allow Saginaw County to adopt a civil service system. The legislature could also authorize the county civil service commission to establish uniform rules and regulations covering all personnel employed by the county.

FRANK J. KELLEY,
Attorney General.