

Opinion No. 2012-023

May 2, 2012

The Honorable Michael Lamoureux
State Senator
103 West Parkway, Suite 1B
Russellville, Arkansas 72801

Dear Senator Lamoureux:

This is my opinion on your questions about Pope County ordinance 78-0-15:

AN ORDINANCE PROHIBITING ELECTED COUNTY OFFICIALS FROM EMPLOYING DEPUTIES AND COUNTY EMPLOYEES WHO ARE RELATED BY AFFINITY OR CONSANGUINITY WITHIN THE THIRD DEGREE TO ANY ELECTED COUNTY OFFICIAL; AND FOR OTHER PURPOSES.

Section 1. Elected Pope County Officials are hereby prohibited from employing Deputies or County Employees who are related by affinity or consanguinity within the ~~third~~ second^[1] degree to any elected County Official.

Section 2. This Ordinance shall become effective on January 1st, 1979.

Section 3. This Ordinance shall not prohibit the continued employment of any County Employee or Deputy serving as an employee or Deputy of an elected County Official prior to the effective date of this Ordinance.

¹ The copy of the ordinance you provided is not signed or attested and contains a handwritten revision striking out “third” and inserting “second” in section 1, although the title refers to “third degree.” You also provided what appears to be a vote tally by precinct, and your request states that the ordinance was approved by county voters, presumably in an initiative or referendum election.

Your questions are:

1. Is the attached county ordinance invalid on grounds of constitutional vagueness or overbreadth because it fails to define county employees, county deputies, elected county officials, affinity or consanguinity within the ordinance?
2. Is the attached county ordinance invalid because it does not include a process or procedure within the ordinance to remove or penalize a county employee or county deputy if they are found to be in violation of the ordinance?
3. Does the county ordinance violate state laws setting qualification requirements for candidates of county elective office who have a related family member who is employed with the county by placing an additional requirement for candidates of county elected officials who have the related family members by preventing those candidates from seeking county elective office without causing the related family member that is employed by the county to be discharged from their county job under the ordinance upon the election and swearing in of the related family member to the county elective office?
4. Does the county ordinance violate the constitutional due process or equal protection rights of candidates of county elective office who have a related family member who is employed with the county by requiring those candidates for county elective office with related family members to consider the termination of a related family member employed with the county while other candidates for county elective office who do not have a related family member do not have to consider the termination of a related family member from employment with the county?
5. Does the attached county ordinance violate a county employee's due process or equal protection under the law by imposing termination under the ordinance if a related family member is elected to county office?

6. Does the language in Section 1 of the county ordinance only prohibit county employment for an individual when their related family member is already a county elected official prior to any county employment of the individual and does not apply in a situation where an individual is employed with the county as an employee or deputy and a related family member subsequently is elected to county office?

RESPONSE

In my opinion, the ordinance is not unconstitutionally vague or overbroad for failing to define the terms specified in your first question. For reasons explained below, I respectfully decline to answer your other questions.

Question 1 – Is the attached county ordinance invalid on grounds of constitutional vagueness or overbreadth because it fails to define county employees, county deputies, elected county officials, affinity or consanguinity within the ordinance?

A statute will pass constitutional scrutiny under a “void for vagueness” challenge if the language conveys sufficient warning when measured by common understanding and practice. *Night Clubs, Inc. v. Fort Smith Planning Comm’n*, 336 Ark. 130, 984 S.W.2d 418 (1999). However, a law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited and is so vague and standardless that it allows for arbitrary and discriminatory enforcement. *Craft [v. City of Fort Smith]*, 335 Ark. 417, 984 S.W.2d 22 (1998)]. Stated another way, a statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004).

Benton Cnty. Stone Co., Inc. v. Benton Cnty. Planning Bd., 374 Ark. 519, 522, 288 S.W.3d 653 (2008).

Your question suggests that the ordinance may be unconstitutionally vague because it does not define several specified words and phrases. Failure to define

terms in a statute may make it unconstitutionally vague. *See, e.g., Arkansas Tobacco Control Bd. v. Sitton, supra* (law was unconstitutionally vague where difference was unclear between “trade discount,” lawful but undefined, and “rebate,” unlawful and defined); *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001) (statute prohibiting undefined “abuse” or “insult” of teacher was unconstitutionally vague). But statutes are not unconstitutionally vague merely for failing to define words and phrases that have clear and generally accepted meanings. *See, e.g., Benton Cnty. Stone Co., supra* (“compatible,” as used in land use ordinance, had plain and ordinary meaning and did not render ordinance unconstitutionally vague); *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007) (capital murder sentencing statutes not unconstitutionally vague for failing to define “mitigating circumstance”); *Bowker v. State*, 363 Ark. 345, 214 S.W.3d 243 (2005) (plain meaning of undefined term “temporary caretaker” gave sufficient warning of prohibited conduct).

In my opinion, the words and phrases “county employees,” “county deputies,” “elected county officials,” “affinity,” and “consanguinity” have plain and ordinary meanings that give affected persons clear notice of the conduct prohibited. The meanings of “county employees,” “county deputies,” and “elected county officials” are, in my view, clear on their faces beyond reasonable argument. The meanings of the words “affinity” and “consanguinity” are perhaps less familiar to laymen, but the words are legal terms of art with clear and established meanings easily discernible by reference to a dictionary. *See, e.g., Benton Cnty. Stone Co.*, 374 Ark. at 525 (quoting dictionary definition in holding word “compatible” to have plain and ordinary meaning).

Your question also suggests that the ordinance may be unconstitutionally overbroad. “An overbroad statute is one that is designed to punish conduct which the state may rightfully punish, but which includes within its sweep constitutionally protected conduct.” *Bailey v. State*, 334 Ark. 43, 52, 972 S.W.2d 239 (1998).

Quorum courts have legislative authority to enact ordinances prohibiting nepotism. *Henderson v. Russell*, 267 Ark. 140, 589 S.W.2d 565 (1979); A.C.A. § 14-14-805(2) (Repl. 1998). A county’s voters likewise, in my opinion, have authority to initiate such ordinances. *See* Ark. Const. art. 5, § 1. The ordinance thus

presumably reaches conduct the county is authorized to prohibit. Your request does not state, nor is it apparent on the face of the ordinance, what constitutionally protected conduct the ordinance prohibits in addition to the conduct the county is authorized to prohibit, or how the ordinance's failure to define terms causes it to reach constitutionally protected conduct. I accordingly am of the opinion that the ordinance is not unconstitutionally overbroad.

Question 2 – Is the attached county ordinance invalid because it does not include a process or procedure within the ordinance to remove or penalize a county employee or county deputy if they are found to be in violation of the ordinance?

Question 3 – Does the county ordinance violate state laws setting qualification requirements for candidates of county elective office who have a related family member who is employed with the county by placing an additional requirement for candidates of county elected officials who have the related family members by preventing those candidates from seeking county elective office without causing the related family member that is employed by the county to be discharged from their county job under the ordinance upon the election and swearing in of the related family member to the county elective office?

Question 4 – Does the county ordinance violate the constitutional due process or equal protection rights of candidates of county elective office who have a related family member who is employed with the county by requiring those candidates for county elective office with related family members to consider the termination of a related family member employed with the county while other candidates for county elective office who do not have a related family member do not have to consider the termination of a related family member from employment with the county?

Question 5 – Does the attached county ordinance violate a county employee's due process or equal protection under the law by imposing termination under the ordinance if a related family member is elected to county office?

Question 6 – Does the language in Section 1 of the county ordinance only prohibit county employment for an individual when their related family member

is already a county elected official prior to any county employment of the individual and does not apply in a situation where an individual is employed with the county as an employee or deputy and a related family member subsequently is elected to county office?

This office consistently declines to interpret local ordinances. *See, e.g.*, Op. Att’y Gen. 2011-140, 2004-173, 2002-290.

[T]his office cannot construe local ordinances. *See, e.g.*, Op. Att’y Gen. Nos. 2008-009; 2007-235; and 2005-278 (and opinions cited therein). The interpretation of local ordinances necessarily involves a determination of the intent of the local legislative body, a factual matter that this office is not well situated to consider and address. It also requires a consideration of other factors of which this office is unaware that could reflect a particular intent on the part of the local legislative body that is not apparent from the face of the ordinance. The awareness of such factors is a matter within the local domain, rather than the domain of this office.

Op. Att’y Gen. 2008-088.

Only your sixth question is expressly an inquiry about the ordinance’s meaning. But your second through fifth questions contain assumptions about what the ordinance means and how it would be applied to the fact situations stated in the questions. Specifically, your second question assumes that a “county employee or county deputy [may in some instances be] found to be in violation of the ordinance,” and your third, fourth, and fifth questions assume that a person’s election as a county official would “caus[e] [a] related family member . . . employed by the county to be discharged from [his or her] county job. . . .”

Given this office’s longstanding policy of not construing local ordinances, it would be inappropriate for me to, in essence, concur with your implicit constructions of the ordinance, to the exclusion of other possible constructions. This is particularly true where, as here, it is not certain that your implicit constructions are those that a court would place upon the ordinance. Specifically, the ordinance is stated as a prohibition on the conduct of elected officials. It is not necessarily the case, then, that a non-elected county employee or deputy could be

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“found to be in violation of” the ordinance or would be subject to discharge upon a relative’s election to county office. Your sixth question itself recognizes the latter aspect. Your inquiries thus would be better addressed to local officials and local counsel.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh