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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

April 23, 1974

Opinion No. 74-123

Franklin R. Theis
Chief Attorney
Department of Administration
State Capitol
Topeka, Kansas 66612

Dear Mr. Theis:

You inquire concerning K.A.R. 1-4-34, and its application to the following facts. The individual in question is and has been employed as a law clerk/research attorney for the Kansas Supreme Court, and has been so employed since September 1, 1973, this being an unclassified position pursuant to K.S.A. 75-2935 (1)(k), and authorized by K.S.A. 75-3122. The present authorized salary is $1103 per month. Effective March 14, 1974, he was appointed Computer Operations Supervisor I, a position in the classified civil service, at the monthly pay of $670. The maximum salary for the classification is $856 per month.

K.A.R. 1-4-34 provides thus:

> "Any salary paid to an employee in the classified service shall represent the total remuneration for the employee, not including reimbursements for official travel. Unless specifically provided by law, [or by this section,] no employee shall receive pay from the state in addition to the salary authorized under the schedules provided in the pay plan for services rendered by him either in the discharge of his ordinary duties, or any additional duties which may be imposed upon him, or which he may undertake or volunteer to perform. Subsistence or maintenance allowance received in lieu of cash shall be considered as part of the total salary. Whenever an employee works for a period less than the regularly established number of hours a day, days a week, or days a month, the amount paid shall be

> proportionate to the time actually employed. The payment of a separate salary from two or more agencies for duties performed in each of such agencies is permissible if the total salary received from these agencies is not in excess of the maximum rate of pay for the class. [Notwithstanding the limits of total salary from two or more state agencies hereinbefore imposed, a classified employee may hold one or more additional unclassified positions teaching in a state educational institution without limit on his total pay, provided such teaching position does not detract from the time for which he is being paid as a classified employee.]" [Emphasis supplied.]

The bracketed language was added by amendment effective January 1, 1970.

The underscored language authorizes the payment of a separate salary from two or more agencies for duties performed in each if the total salary received from all such agencies "is not in excess of the maximum rate of pay for the class." The immediate and critical question becomes, what class? If an individual holds one classified position with one agency, and takes an additional and different classified position with another agency, under the regulation, he may receive separate salaries from each "if the total . . . is not in excess of the maximum rate of pay for the class." The regulation furnishes no guidance to determine which class is to be "the class" for determining if the total salary exceeds its maximum rate of pay.

The silence of the regulation on this point draws into question its significance as a deterrent against multi-job holding. The Department of Administration has historically viewed the underscored language as tantamount to a prohibition against the practice of a state employee holding two state jobs, its "principal purpose" you suggest, being "to discourage, particularly, classified civil service employees from holding two state positions by decreasing the incentive for holding a classified position while at the same time holding another classified or unclassified position."

On its face, K.A.R. 1-4-34 appears designed to assure the integrity of the salary and wage schedules adopted pursuant to K.S.A. 75-2938(b). It makes clear that for the services performed by an employee in the classified service, no employee shall receive any pay "in addition to the salary authorized under the schedules provided in the pay plan." When an employee works less than the regularly established time, the amount paid shall be proportionate to the time actually employed. The

sentence involved here may reasonably be construed only in the context of such prohibitions. To reiterate, it states thus:

> "The payment of a separate salary from two or more agencies for duties performed in each of such agencies is not in excess of the maximum rate of pay for the class."

Its silence upon the choice between two or more available classes to determine the "maximum rate of pay for the class" strongly suggests that application of the provision is contemplated to depend upon an unstated assumption, that no choice is necessary, and that the provision is to be invoked to restrict the total salary paid to an employee in the classified service only in the circumstance when he is employed simultaneously in the same classification by two or more state agencies who share that employee's services. Thus viewed, this provision loses its force as a deterrent against so-called "moonlighting," the holding of two separate full-time employments, and operates only to assure that an employee may not circumvent civil service salary schedules by taking separate positions, each in the same classification, with two separate state agencies who undertake to share that employee's services, and thereby be paid the full salary for each position, although the employee works only the equivalent of one full-time position.

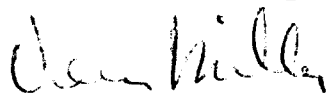
In view of the unstated, but clearly implicit assumption in this provision that the two or more positions held by the employee are in the same class, we cannot but interpret the regulation on the basis of that assumption, and as requiring no choice between classes to determine whether an employee holding two or more positions with separate state agencies is entitled to receive pay from each. Moreover, the context of the sentence lends weight to this construction. As stated above, the apparent purpose of the regulation in its entirety is to assure adherence to and discourage circumvention of state salary and wage schedules. A construction of this provision as concerned with so-called "moonlighting" would render the sentence irrelevant to the obvious purpose of the entire section.

To some extent, the sentence preceding that quoted above provides protection against the kinds of potential abuse by requiring that when an employee works less than the regularly established period of time in a given position, the amount paid shall be proportionately reduced. However, circumstantial potential for abuse or circumvention resulting specifically from multi-job holding may have suggested the desirability of the specific limitation and safeguards provided by the sentence in question. In this construction, we have disregarded the language added by amendment in 1970, as shedding no helpful light on the proper construction to be given the sentence in question.

We would point out that a contrary construction of this provision would raise serious questions of the liability of the appointing authority under K.S.A. 75-2951 in the circumstances presented here.

In our opinion, and based upon the construction of the above provision, the individual in question who seeks to hold positions both as a law clerk/research attorney with the Kansas Supreme Court and as a computer operations supervisor I may do so, and payment of full salaries for each position is not prohibited by K.A.R. 1-4-34.

Yours very truly,



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