



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

April 24, 1975

Opinion No. 75- 187

Mr. David L. Thompson
Montgomery County Attorney
Montgomery County Courthouse
Independence, Kansas 67301

Dear Mr. Thompson:

You advise that at the April 1 election, a Coffeyville attorney was elected to the board of city commissioners of that city. Several questions have arisen under K.S.A. 12-1601, which states thus:

"It shall be unlawful for any elected or appointed public officer of any city to act as attorney, counselor or adviser adversely to such city in any litigation or controversy in which said city may be directly or indirectly interested."

The question arises, first, whether the City of Coffeyville is "directly or indirectly interested" in any prosecution which is originated by or pursued by the Coffeyville Police Department. In an opinion dated April 23, 1968, Attorney General Robert Londerholm stated thus:

"[W]e are not aware of any statute, rule of court, canon of ethics, custom or practice which would prevent a city attorney from defending a state criminal prosecution either in the courts of his county or another county. The only exception to this general principle would be where acts are committed within the city which might constitute a violation of both state law

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and the city's ordinances. In such a case, the city attorney might be called upon to prosecute under the city ordinance, and therefore should not defend against the state charged."

If a prosecution is for violation of a city ordinance, the City is legally "interested" in that prosecution, in our opinion. If the prosecution is for violation of a state law, the city is not, in our opinion, legally "interested" in that proceeding, even though the subject may have initially been arrested and the investigation conducted by the city police department. Once the state charge is lodged, and no accompanying city charge is filed, the state, and not the city, is the legally "interested" party. Understandably, if a state prosecution is commenced on the basis of investigation and arrest made by city police, the city department might reasonably be interested, in a personal and professional sense, in the outcome of the prosecution. However, in a legal sense, the city as a municipal corporation is not legally interested in the proceeding.

Secondly, you inquire whether the Judge of the Municipal Court of the City of Coffeyville, who is appointed and employed by the city manager subject to approval of the board of city commissioners, an "appointed public officer" within the meaning of K.S.A. 12-1601. A municipal judge is, in our opinion, a public officer, and thus is within the prohibition of K.S.A. 12-1601.

Thirdly, you question whether the city attorney of the City of Coffeyville, who is also employed and appointed by the city manager, subject to approval of the board of city commissioners, is an "appointed public officer" of the city subject to K.S.A. 12-1601.

The question of what constitutes a "public office" and who is a "public officer" is not entirely free from difficulty. In Sowers v. Wells, 150 Kan. 630, 95 P.2d 281 (1939), the court stated thus:

"What is a 'public office' and who is a 'public officer'? While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that the right to

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exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.' . . . In Kingston Associates v. La Guardia, 281 N.Y.S. 390, 156 Misc. 116, in distinguishing between 'public office,' and an 'employment,' the New York court said:

"There is, however, one indispensable attribute of public office, namely, the right to exercise some portion of the sovereign power. 'Public office' has been defined by Mechem in his work on Public Officers, . . . as 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' The author quotes with approval . . . the following language of the judges of the supreme court of Maine in Opinion of Judges, 3 Greenl. (3 Me.) 484: 'We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office . . . The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment has none of these distinguishing features.'"

In Miller v. Ottawa County Commissioners, 146 Kan. 481, 71 P.2d 875 (1937), the court held that a county engineer was a public officer. In State v. Ottawa, 84 Kan. 100 (1911), a case involving the application of the so-called eight-hour law to certain employees, the court pointed out thus:

"Officers are excluded by the use of the word 'employed,' an office being distinguished from employment in that it implies tenure, duration, emolument and duty" 84 Kan. at 105.

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In Miller v. Ottawa County Commissioners, supra, the court stated other helpful criteria thus:

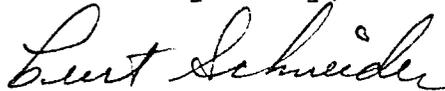
"The distinction between an officer and an employee is that the responsibility for results is upon one and not upon the other. There is also upon an officer the power of direction, supervision and control. The distinction between a public officer and an employee is concisely made in 22 R.C.L. 379, in the following language:

"'A public office is not the same thing as a contract, and one contracting with the government is in no just and proper sense an officer of the government. The converse is likewise true and an appointment or election to a public office does not establish a contract relation between the person appointed or elected and the public.'" 146 Kan. at 484-485.

A city attorney, as a part of the duties of that position, is often called upon to advise the city governing body concerning legal affairs of the city, draft proposed ordinances and resolutions for the governing body, draft and review contracts proposed for the city, and act otherwise as an adviser and counselor. In this capacity, the city attorney does not exercise any independent sovereign power of the city, but merely as its counselor and adviser. As a prosecutor, however, the city attorney does exercise, in the name of the city, independent power, prosecuting in the name of the city offenses against its ordinances and codes. On this basis, it is our opinion that the city attorney is a "public officer," and as such, is an "appointed public officer," subject to K.S.A. 12-1601.

We have reviewed the existing file of opinions dealing with this general question, and find none that enlarge upon the question beyond the scope of this opinion. If further questions should arise, please feel free to call upon us, however.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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