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ATTORNEY GENERAL OPINION NO. 79- 248

The Honorable John E. Chandler  
State Senator, First District  
105 Lincoln  
Holton, Kansas 66436

Re: Elections--Second Class Cities and School  
Districts--Simultaneous Candidacy and  
Incumbency

Synopsis: There are no legal obstacles to a person's simultaneous candidacy for the office of city commissioner of a city of the second class and for a member position on the board of education of a unified school district. However, the common law doctrine of incompatibility of offices precludes one person from concurrently holding both such offices, and under this doctrine, such person's acceptance of the second office ipso facto vacates the first.

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Dear Senator Chandler:

In your letter of February 8, 1979, you have posed the following question:

"Do our laws permit the same individual to be a candidate in the same election for a position on the city commission of a second class city with commission manager form of government and a place on the school board of the unified school district in which such second class city is located?"

A city manager form of municipal government, regardless of the particular type of legislative body utilized in connection with the city manager, is governed generally by the provisions of Article 10 of Chapter 12 of Kansas Statutes Annotated. With respect to nominations and elections in cities operating under the commission-manager form of government, K.S.A. 12-1003 provides:

"All nominations and elections in cities adopting this act shall be governed by the laws of the state of Kansas relating to elections in the cities of the first, second and third classes under commission government, insofar as the same are applicable . . . ."

Thus, to the extent they are applicable, the statutes governing elections in cities of the second class having a commission form of government are relevant to your question. A review of these statutes, as well as the statutes pertaining specifically to the commission-manager form of government, does not reveal any statutory constraints regarding a person's simultaneous candidacy for the position of city commissioner of a second class city and for a board member position on the board of education of a unified school district.

In addition, our perusal of the statutes prescribing general requirements for city elections (K.S.A. 25-2101 et seq.) has not produced any such statutory prohibition. Similarly, we find nothing addressing this proposition in the statutes pertaining to school district elections (K.S.A. 25-2001 et seq.) or to the methods for electing school board members (see K.S.A. 72-7901 et seq. and 72-8001 et seq.).

Thus, it is our conclusion that there are no statutory obstacles to a person's simultaneous candidacy for the office of city commissioner of a city of the second class and for a member position on the board of education of a unified school district, so long as such person is otherwise legally qualified as a candidate for each of the respective offices. However, while that conclusion provides a response to your specific inquiry, it does not address the question of whether a person having such simultaneous candidacy may hold both offices if so elected to both offices, which we assume was implied in your opinion request.

In this regard, existing statutory provisions do not provide much assistance. The statutes relating to boards of education are silent on this proposition, and the only pertinent statute concerning commissioners of a city of the second class is K.S.A. 14-1302, which provides in part:

"No member of the board of commissioners shall hold any office of profit under the laws of any state or the United States, or hold any county or other city office . . . ."

While pertinent to our consideration, in our view it requires little discussion to note that the foregoing provisions do not preclude the simultaneous holding of the offices in question, since the position of member of a board of education is clearly neither a federal, state, county or city office within the prohibition of this statute. Therefore, a resolution of the question whether a person may hold both of these offices requires a determination of whether these offices are incompatible.

There are two principal Kansas cases concerning the incompatibility of offices. In Abry v. Gray, 58 Kan. 148 (1897), the Court adopted the essential language of 19 American and English Encyclopedia of Law, 562, as follows:

"The incompatibility which will operate to vacate the first office must be something more than the mere physical impossibility of the performance of the duties of the two offices by one person, and may be said to arise where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

Subsequently, in Dyche v. Davis, 92 Kan. 971 (1914), the Court held:

"Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other . . . . It is an inconsistency in the functions of the two offices." Id. at 977.

Thus, in reading these cases together, it is apparent that the Kansas Supreme Court has determined that incompatibility of offices requires more than a physical impossibility to discharge the duties of both offices at the same time. There must be an inconsistency in the functions of the two offices, to the extent that a performance of the duties of one office in some way interferes with the performance of the duties of the other, thus making it improper, from a public policy standpoint, for one person to retain both offices. This rule is in accord with general authorities. In 89 A.L.R. 2d 632, it is stated:

"It is to be found in the character of the offices and their relation to each other, in subordination of the one to the other, and in the nature of the duties and functions which attach to them, and exist where the performance of the duties of the one interferes with the performance of the duties of the other. The offices are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both." (citations omitted.) Id. at 633.

Further, general authorities provide assistance in determining when the nature and duties of two offices are inconsistent, so as to render them incompatible. For example:

"[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts." 67 C.J.S. Officers §27.

In applying the foregoing to your inquiry, it is our opinion that the office of city commissioner of a city of the second class and the office of board member of a unified school district are incompatible. While we have been unable to discover any specific instance where one office is vested with any direct or indirect supervisory power over the other, it is our judgment that, because of the nature and duties of the two offices, the functions of these offices are inconsistent.

Our conclusion is predicated, in part, by the fact that these offices have overlapping constituencies. A person holding both offices is confronted with the duty of faithfully, impartially and efficiently discharging the duties of these offices in the best interests of their respective constituencies. There are numerous instances in which such person may be called upon to make decisions on matters where the interests of the respective constituencies therein will not be identical.

For example, pursuant to K.S.A. 12-2901 et seq., public agencies are authorized to contract with one another with respect to such matters as

"public improvements, public utilities, police protection, libraries, data processing services, educational services, building and related inspection services, flood control and storm water drainage, weather modification, sewage disposal, refuse disposal, park and recreational programs and facilities, ambulance service, fire protection, the Kansas tort claims act or claims for civil rights violations . . . ."  
K.S.A. 12-2904 (as amended by L. 1979, ch. 55, §1, as further amended by L. 1979, ch. 56, §1).

Cities and school districts are both included within this act's definition of "public agency," as stated in K.S.A. 12-2903(a). Thus, utilization of these statutory provisions by the particular city and school district will require the incumbent of the two offices in question to participate in the negotiation of the contracts and agreements contemplated therein in a manner that will be in the best interests of both constituencies. A conflict will arise where the best interests of one constituency is not identical to the best interests of the other.

Pursuant to K.S.A. 12-1901 et seq. cities and school districts are authorized to operate systems of public recreation and playgrounds. Under K.S.A. 1978 Supp. 12-1902, a "city or school district may operate such system independently, or may cooperate in its conduct in any manner mutually agreed upon, or may delegate the operation of the system to a recreation commission created by either or both of them." Again, any cooperative venture hereunder will require the dual office holder to represent the best interests of both constituencies where such interests may not necessarily be the same.

More generally, the matters of taxation and the issuance of general obligation bonds raise similar considerations. Both governmental units have the power to levy ad valorem taxes and to issue bonds backed by the obligation to levy taxes in support thereof. We submit that the exercise of such powers by one such governmental body will not necessarily be in the best interests of the other.

Similarly, the authority of a school district to construct school buildings raises additional problems. K.S.A. 72-1626, which is applicable to school districts in first and second class cities, authorizes a school board to issue general obligation bonds "to purchase or improve a school site or sites, to construct, equip, furnish, repair, remodel or make additions to any building or buildings used for school purposes." Can it reasonably be argued that the exercise of the foregoing authority to acquire sites within the city's corporate limits, and to construct school buildings thereon, will always be consonant with the city's interest in maintaining its tax base or in exercising its authority to regulate land use within the city through its planning and zoning powers? We think not.

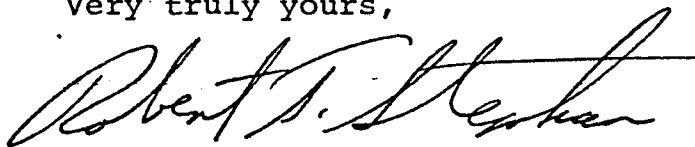
Without unduly burdening this opinion by recitation of further examples of overlapping responsibilities, suffice it to state that, in our judgment, the foregoing examples sufficiently demonstrate that the respective duties and functions of these two offices are inherently inconsistent and repugnant, to the extent that one person cannot faithfully, impartially and efficiently discharge the duties of both offices. Furthermore, we believe that considerations of public policy render it improper for an incumbent to retain both. Even if the incumbent of one office were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the other office, such abstention deprives one constituency or the other of a representative who is free to

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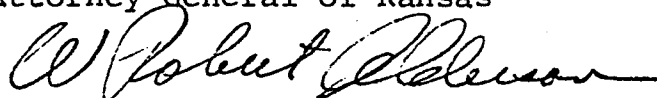
make independent judgments on such matters. It is our opinion that the constituencies of both offices are entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters.

Having thus determined the incompatibility of the public offices under consideration, the question arises as to the effect of such determination. In those Kansas cases where it has been determined that two public offices held by the same person are incompatible, the Court has held that such person's acceptance of the second office ipso facto vacates the first office held by such person. See, e.g., Gilbert v. Craddock, 67 Kan. 346, 362, 363 (1903), and Moore v. Wesley, 125 Kan. 22, 24, 25 (1928). Such principle would be applicable here, although we are not sufficiently advised of particular facts to render judgment as to which of the two particular offices would be vacated, in the event a person who is a candidate simultaneously for both offices were elected to both.

Very truly yours,



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RTS:WRA:gk