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ATTORNEY GENERAL OPINION NO. 79- 251

B. D. Watson
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Re: Cities of the Third Class--Officers--Simultaneous
Employment of City Officer by City

Synopsis: The common law doctrine of incompatibility of offices may be utilized to scrutinize the propriety of one person simultaneously being a public officer and public employee, where such person is compensated for both such positions from public funds. Application of such doctrine to the situation where an individual is councilman for a city of the third class and, at the same time, an employee of such city discloses an incompatibility in the functions and duties of such positions, requiring such person to vacate the office of city councilman.

* * *

Dear Mr. Watson:

You have requested our opinion as to the ability of a councilman for Elk City, Kansas, a city of the third class, to simultaneously be an employee of that city. In submitting your request, you have offered your suggestion that these positions appear to be incompatible.

Your question requires consideration of the legal compatibility of these positions. Our review of pertinent statutes confirms your conclusion that there are no statutory prohibitions applicable to the situation you have presented. Similarly, we are aware of no Kansas judicial decision which would specifically preclude a city councilman simultaneously being employed by the city. However, the question arises as to whether the common law doctrine of incompatibility of offices would preclude a person from holding both positions simultaneously.

In Dyche v. Davis, 92 Kan. 971 (1914), the Kansas Supreme Court defines this doctrine as follows:

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

It is important to note, and pertinent to your inquiry, that this common law principle is, for the most part, limited to situations involving the simultaneous holding of two public offices, as opposed to public positions. The general rule is stated thusly:

"The prohibition against one person holding more than one office at the same time is referenced to offices as distinguished from positions in public service that do not rise to the dignity of office. It does not extend to a position which is a mere agency or employment." (Emphasis added.)
63 Am.Jur.2d Public Officers and Employees §64, pp.669, 670.

Although some jurisdictions have now enlarged this doctrine to include both public offices and public employment without restriction (see 70 A.L.R. 3rd 1188), the majority of states follow the traditional rule. (See 63 Am.Jur.2d Public Officers and Employees §64, pp.669, 670.) While the Kansas Supreme Court has for the most part adhered to the majority rule, in Dyche v. Davis, supra, the Court applied the doctrine to a situation where a public officer also held a position of public employment and the compensation for the public office and employment were both payable from public funds. 92 Kan. at 977. Based on that decision, we believe it necessary to consider your inquiry in light of this common law principle.

In addition to Dyche, the other principal case concerning the incompatibility of offices is Abry v. Gray, 58 Kan. 148 (1897), where 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." Id. at 149.

Thus, in reading Dyche and Abry 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 incumbents 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, as 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.

From the foregoing authorities it is apparent that the simultaneous holding of two offices, or the simultaneous holding of a public office and a position of public employment where the compensation for both are payable from public funds, does not per se create incompatibility. Determination of incompatibility, as a matter of law, requires a factual comparison of the duties and functions of the respective positions. In framing your opinion request you indicated that the councilman in question "is the only city employee the city has, except for a policeman," but your letter does not identify the employment position or describe the functions and duties thereof. However, even absent such specific factual data, we have no difficulty in concurring in your opinion that the positions are legally incompatible.

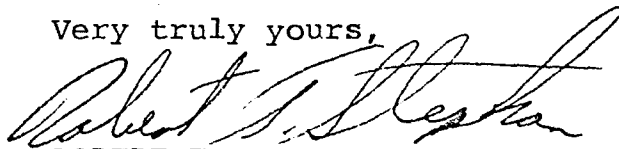
Our research has disclosed that the threshold for application of the common law doctrine of incompatibility of offices (announced in Dyche v. Davis, supra) to the instant situation has been satisfied, i.e., the individual in question not only is paid from public funds for his services as a city employee, but also is compensated by the city (even though it is slight) for serving as councilman. Further, without any information to the contrary in your letter, we assume that, as a city employee, such individual is hired by the city council, his salary is fixed by the council and he is subject to constant supervision by the council. Under these circumstances, for such individual to simultaneously serve as a member of the city council creates, in our judgment, an inconsistency in the functions of the two positions, to the extent that a performance of the duties of one interferes in the performance of the duties of the other.

Further, we also find these positions incompatible from a public policy standpoint. Even if the councilman were to abstain from discussing and voting on matters pertaining to his employment position, such action deprives the councilman's constituency of a representative who is free to make independent judgments on such matters. In our judgment, constituents of a city councilman are entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters properly before the council. In this instance, the continuing conflict resulting from his being concurrently both an officer and employee of the city precludes such representation.

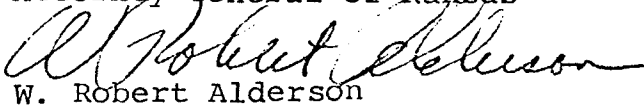
Pursuant to the principles enunciated in Dyche v. Davis, supra, it is contrary to the public interest to pay two salaries from public funds where such incompatibility exists. Moreover, in those Kansas cases where it has been determined that two public offices held by the same person are incompatible, the Court has held that such person has vacated the first office upon acceptance of the second. See Gilbert v. Craddock, 67 Kan. 346, 362, 363 (1903), and Moore v. Wesley, 125 Kan. 22, 24, 25 (1978). While these decisions have dealt with the incompatibility of two public offices, Kansas cases offer no direct guidance as to the consequences of determining that a public office and a position of public employment, simultaneously held by one individual, are incompatible. However, it is our judgment that, since a person has no right to hold a public office that is incompatible with such person's position of public employment, where compensation for both the office and employment position is paid from public funds, the public office must be vacated. Support for such conclusion is found in decisions from other jurisdictions. See, e.g., Haskins v. State of Wyoming, 516 P.2d 1171, 70 A.L.R. 3d 1171 (1973), and Ferguson v. True, 66 Ky. 255 (1867).

In summary, it is our opinion that the common law doctrine of incompatibility of offices may be utilized to scrutinize the propriety of one person simultaneously being a public officer and public employee, where such person is compensated for both such positions from public funds. In our judgment, the application of such doctrine to the situation where an individual is councilman for a city of the third class and, at the same time, an employee of such city discloses an incompatibility in the functions and duties of such positions, requiring such person to vacate the office of city councilman.

Very truly yours,



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