



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 13, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79- 254

Mr. Jay W. Vander Velde
Lyon County Attorney
Lyon County Courthouse
Emporia, Kansas 66801

Re: Counties and County Officers--County Attorney--
Assistant County Attorney Holding Other Offices

Synopsis: Kansas law does not preclude an assistant county attorney from simultaneous employment in other county offices or positions, judicial or otherwise. Simultaneous employment as assistant county attorney, district court trustee, small claims court judge pro tem, and administrative assistant to the board of county commissioners does not present an incompatibility of offices as a matter of law, nor does it ipso facto create conflicts of interest.

* * *

Dear Mr. Vander Velde:

You have asked for our opinion whether K.S.A. 19-705 operates to preclude an assistant county attorney from holding office and serving as district court trustee for the Fifth Judicial District, as small claims court judge pro tem, and as administrative assistant to the Lyon County Board of County Commissioners. You advise that "[m]ost all of the duties carried on by Phil Winter [who presently holds all of the aforementioned positions] present no open conflict of interest, one to the other, however, there are certain areas which may present the possibility of a conflict."

K.S.A. 19-705 provides as follows:

"No county attorney shall receive any fee or reward from or on behalf of any prosecutor or other individuals, except such as are allowed by law for services in any prosecution or business to which it shall be his official duty to attend, nor be concerned as attorney or counsel for either party, other than the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced but undetermined, shall depend; nor shall any county attorney while in office be eligible to or hold any judicial or other county office whatsoever."

The statute makes no mention of assistant county attorneys, and thus does not expressly prohibit them from serving in other capacities from which the county attorney is precluded. Though there are no Kansas cases in point, we find that former Attorneys General Robert Londerholm and Kent Frizzell construed the statute in question to apply to assistant county attorneys. In an opinion written July 3, 1968, in answer to a county attorney's inquiry concerning hiring a municipal judge and county judge pro tem to serve as assistant county attorney, General Londerholm wrote:

"While the restriction of K.S.A. 19-705 on a county attorney holding any judicial office does not specifically apply to an assistant county attorney, we feel that the spirit of this statute would also encompass an assistant county attorney." Opinions of the Attorney General, Vol. VI, p. 222.

General Frizzell affirmed that view (see Opinions of the Attorney General, Vol. VI, pp. 257-58), citing in support of his conclusion 27 C.J.S. District and Prosecuting Attorneys, §30(1), which section states, in pertinent part:

"An assistant or deputy prosecuting attorney legally appointed, or a prosecuting attorney pro tempore, is generally clothed with all the powers and privileges of the prosecuting attorney; and all acts done by him in that capacity must be regarded as if done by the prosecuting attorney himself."

It is our opinion, however, that nothing in the Kansas statutes nor under the general authorities operates to preclude assistant county attorneys from serving in other county positions or offices, judicial or otherwise, and we respectfully record our disagreement with the aforementioned opinions of the previous Attorneys General.

K.S.A. 19-706b empowers the county attorney, within budgetary limitations imposed by the board of county commissioners, "to appoint such deputies and assistants as are necessary to properly expedite the business of his office" and to prescribe their powers and duties "within the scope of the office of county attorney." Significantly, the statute does not proscribe any outside employment.

As to your concern over the possibility of conflicts of interest and incompatibility of functions, it is our judgment that, as a matter of law, there is no incompatibility of the several offices Mr. Winter presently holds. You have noted some examples of potential conflicts arising out of Mr. Winter's employment in the several positions. We refer you to Attorney General Opinion No. 79-25 for a review of Kansas case law and relevant provisions of the code of professional responsibility. In that opinion, we concluded that the possibility of conflict of interest in the holding of the offices of city attorney and county attorney does not make them incompatible as a matter of law.

Essentially, as stated in one encyclopedic discussion of the doctrine of incompatibility of offices,

"the test of incompatibility is the incompatibility of functions or duties of the offices [T]he issue is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other." 67 C.J.S. Officers, §27. (Emphasis added.)

Unfortunately, the definition of incompatibility is generally left to a determination based on the facts and circumstances of a particular case. However, the general authorities offer some basic principles to guide such an inquiry. 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.

In his article on incompatibility of offices, Frank Bien, attorney for the League of Kansas Municipalities discusses another important test of incompatibility.

"Subordination of one office to the other is one of the more important tests. Examples of such subordination occur where: one office has supervision over the other; one office has control over the fiscal needs of the other; the incumbent of one office may vote for the appointment or removal of the holder of the other office, and where one office is subordinate to the other in some of its important and principal duties. In these situations it is clear that the exercise of the duties of both offices by one person may conflict to the public detriment."
Bien, Incompatibility of Offices, Kansas Government Journal, Vol. LVI, No. 10 (Oct. 1970), p. 421.

In our judgment, none of those tests is applicable here. Arguably, Mr. Winter's role as legal advisor to the Board of County Commissioners may, in some sense, place him in "control" of the office of county attorney, particularly as his advice may pertain to matters of budget and expense vouchers submitted by your office for the Board's consideration. However, it is clear that the Board's legal advisor is not empowered by law to make county policy decisions; only the Board may make those decisions. Hence, we cannot conclude that the office of county attorney is subordinate to, or controlled by, Mr. Winter in his capacity as the Board's counselor.

Further, you have noted that Mr. Winter's functions as assistant county attorney and as administrative assistant to the Board of County Commissioners are somewhat the same. We note, in further consideration of the general authorities, that it has been held that

"[t]here is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."
89 A.L.R.2d 632, 633.

It is important to note that there is some authority for the proposition that the potentiality or possibility of conflict creates an incompatibility of office. The Supreme Court of Wyoming declared that because of the potentiality of conflicts of interest, a school teacher could not serve as a member of the local board of education. Haskins v. State, 516 P.2d 1171, 70 A.L.R.3d 1171 (Wyo., 1973). One commentator summarized the case, in pertinent part, as follows:

"In support of its position, the court noted that an employee carrying out a function of the board of education which he serves is continually under the jurisdiction and authority of the board, is hired by that board and may be fired by it, and is constantly subject to its supervision, the court pointing out that in all good faith and without

thought of personal gain, the teacher's goals and aims in performance of his teaching duties may be at variance with the resources of his district and the general standards of the community. The court said that such conflicts went to the entire scope of the person's functions as a board member and as a teacher, the court noting that for the teacher to hold office as a school trustee of, while acting as a teacher in, the same school district, would deprive the citizens of the district of the independent judgment of a full and impartial board of trustees elected to represent the entire public interest. With respect to the contention that the teacher would absent himself from the discussion and voting on certain matters involving self-interest, the court said that the community had a need for continuing exercise of judgment and the making of decisions on the basis of give-and-take discussion of independent minds, and that such need was not served best when one of the board must at frequent intervals take no part because of conflict." 70 A.L.R.3d 1188, 1190.

As the Wyoming court affirms, the controlling issue is whether the occupancy of more than one public office or position by the same person is detrimental to the public interest. The Wyoming court resolves this important public policy question by declaring the positions of school teacher and school board member incompatible as a matter of law.

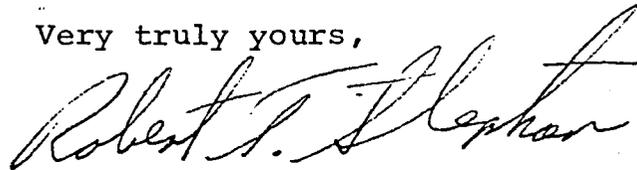
The question you have raised about Mr. Winter's employment in the several positions he presently holds is distinguishable. Most of the potential conflicts you have identified may affect his ability to function "faithfully, impartially, and efficiently" on behalf of the Board of County Commissioners and the office of the county attorney. If conflicts do eventually occur, or occur too frequently, thus necessitating the hiring of outside counsel or otherwise promoting inefficiency detrimental to the public interest, the county attorney and the Board of County Commissioners may deem it appropriate to change the present scheme.

Mr. Jay W. Vander Velde
Page Seven
November 13, 1979

Certainly, as we emphasized in Attorney General Opinion No. 79-25, should a situation develop where the performance of the duties of one office interferes with the duties of another, the offices would be incompatible, and a person cannot serve simultaneously in such positions, as a matter of law. The attorney serving in the several capacities must be alert to those instances where a conflict of interest is likely to develop and exercise sound professional judgment in determining whether continued employment in those potentially conflicting capacities is appropriate.

It is our view that resolution of questions of potential conflicts occasioned by the attorney's employment in various offices is appropriately left to the considered judgment of the attorney and the attorney's respective employers.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

RTS:WRA:SC:gk

Enclosure: Attorney General Opinion No. 79-25