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November 9, 1979

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ATTORNEY GENERAL OPINION NO. 79-256

David L. McLane, City Attorney
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101 North Pine
Pittsburg, Kansas 66762

Re: Cities of the Second Class--Board of Commissioners--
Eligibility to Hold Other Office

Synopsis: A county appraiser is a county officer, and a member of the board of commissioners of a city of the second class is precluded by K.S.A. 14-1302 from holding such office. Thus, where the finance commissioner of the City of Girard accepted an appointment as the county appraiser for Crawford County, a vacancy was created in the office of finance commissioner. However, such person's continued service as Girard's finance commissioner, subsequent to his forfeiture of the office as a matter of law, was as a de facto officer, and all of his acts in such capacity are valid as to the general public and third persons.

* * *

Dear Mr. McLane:

You have asked our opinion whether the position of "county assessor" is a county officer within the meaning of K.S.A. 14-1302, which inter alia prohibits any member of the board of commissioners of a city of the second class from holding any county office. In submitting your opinion request, you have advised that the current finance commissioner for the City of Girard, a city of the second class, has been appointed as "county assessor" pursuant to K.S.A. 19-421.

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Initially, please be advised that K.S.A. 19-421 has been repealed (see L. 1974, ch. 112, §11) and "county appraisers" are now appointed pursuant to K.S.A. 19-430. You also might note that the change in terminology from "assessor" to "appraiser" is addressed by K.S.A. 1978 Supp. 19-425.

We have no difficulty in concluding that the county appraiser is a county officer. The statutes in Article 4 of Chapter 19 of Kansas Statutes Annotated, which govern the appointment, compensation, power and duties of appraisers, lead us to this conclusion. Pursuant to K.S.A. 19-430, the board of county commissioners, by resolution, appoints a county appraiser "for a term of four (4) years." That statute also makes provisions for filling of vacancy "in the office of county appraiser."

K.S.A. 19-432 requires the director of property valuation of the state department of revenue to maintain a list of persons who are eligible for appointment to the "office of county appraiser," and K.S.A. 19-433 requires the appraiser to take and subscribe to an oath "as county officials."

In making provision for reimbursement of expenses incurred by any appraiser, deputy appraiser or other employee of the appraiser, K.S.A. 19-435 provides that the county commissioners "shall allow mileage to any such officer, deputy, or employee" at the prescribed lawful rate. Further, K.S.A. 19-431 provides for the eventuality that the appraiser fails or neglects "to properly perform the duties of his office." In prescribing procedures and requirements applicable thereto, this statute in numerous places refers to the position of county appraiser as an "office" and refers to the county appraiser as an "officer."

Additionally, K.S.A. 1978 Supp. 19-425 vests in the county appraiser the authority to appoint deputy appraisers and fix their salaries, with the consent of the county commissioners, and each deputy appraiser so appointed, "before entering upon the duties of his office," also must take and subscribe to an oath. This same statute also requires the board of county commissioners to furnish the appraiser with "necessary office space and such clerical help as may be needed to carry out the duties of his office."

Not only do these statutes describe the county appraiser as an "officer" and refer to his or her position as an "office," it also is clear from reading these statutes that the powers, duties and functions to be performed by the appraiser compel the conclusion that the appraiser is an officer and not an employee. In Sowers v. Wells, 150 Kan. 630 (1934), the Kansas Supreme Court described a "public office" as follows:

"While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that a right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.'" (Emphasis added.) Id. at 633.

In 53 A.L.R. 595, the foregoing proposition was discussed as a principal element of the general rule:

"It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements." Id.

This rule was adopted and applied in Miller v. Ottawa County Comm'rs, 146 Kan. 481 (1937), where the Court also stated:

"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 power of direction, supervision and control." Id. at 484.

Applying the foregoing principles to the position of county appraiser, it is clear that such position is a public office: (1) it is created by law; (2) the duties and functions are continuing in nature, and not occasional or intermittent; and (3) it is vested with a significant degree of direction, supervision and control. Furthermore, in addition to the statutes previously cited herein, numerous statutes contained in the various articles in Chapter 79 of Kansas Statutes Annotated vest substantial power and authority in the county appraiser with respect to the valuation of property for the purpose of ad valorem taxation.

Thus, in our judgment, it is clear that the county appraiser is a public officer, and the fact that the appraiser is appointed by the county commissioners and compensated by the county, coupled with such officer's style of office, compels the conclusion that the county appraiser is an officer of the county. Therefore, pursuant to K.S.A. 14-1302, a commissioner of a city of the second class is precluded from holding the office of county appraiser.

Statutorily, then, these offices are incompatible, and the question arises as to the effect of one person claiming right and title to both such offices. 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. The following excerpt from Moore v. Wesley, 125 Kan. 22 (1928), is particularly instructive in this regard:

"In Shell, Judge, v. Cousins et al.,
77 Va. 328, 332, it was said:

"'It was the acceptance of the incompatible office and holding the same for even so brief a space of time that forfeited the first office, and, as we have seen above, created an actual vacancy in the same, without any proceedings to remove him whatever, by quo warranto or otherwise; and if the office was thus vacant, and he absolutely out of it, he could in no manner affect the first office by what he did with the second, since resigning one office could not put a party in an office, nor could it restore him to one he had actually vacated.'

"In Mechem on Public Officers the rule is thus stated:

"'It is a well-settled rule of the common law that he, who, while occupying one office accepts another incompatible with the first, ipso facto, absolutely vacates the first office and his title is thereby terminated without any other act or proceeding. That the second office is inferior to the first does not affect the rule. And even though the title to the second office fail, as

where the election was void, the rule is still the same, nor can the officer then regain possession of his former office, to which another person has been appointed or elected.' (§420.)

"The general rule, therefore, that the acceptance of, and qualification for, an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public.' (§426.)

"So far as our own cases bear on this precise point they recognize this principle. (Abry v. Gray, 58 Kan. 148, 48 Pac. 577; Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 869; Dyche v. Davis, 92 Kan. 971, 142 Pac. 264; Congdon v. Knapp, 106 Kan. 206, 187 Pac. 660.) See, also, extended note in L.R.A. 1917 A.216 et seq." 125 Kan. at 24, 25.

In accordance with these well-recognized principles, it is our opinion that, when the finance commissioner for the City of Girard accepted his appointment as county appraiser for Crawford County, he forfeited the office of finance commissioner, creating an immediate vacancy therein. Since a vacancy now exists, and has existed for some time as a matter of law, it is the responsibility of the remaining members of the board of commissioners to appoint a successor, as provided in K.S.A. 14-1305, to fill the balance of the unexpired term.

The fact remains, though, that such person has continued to serve as finance commissioner, even though he has accepted his appointment as county appraiser and has commenced upon the duties of that office. However, absent any information to the contrary, we assume that such dual officeholding has been in good faith and that such person has been performing the functions and duties of both offices without his or the public's knowledge that he has forfeited the office of finance commissioner. In our judgment, therefore, subsequent to the point in time he forfeited the office of finance commissioner as a matter of law, he has continued to serve in such capacity as a de facto officer of the City of Girard.

A de facto officer, as distinguished from a de jure officer, is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." 63 Am.Jur.2d §494. As stated in paragraph 5 in the Court's syllabus in Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546 (1975):

"A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as the rightful holder of the office by all who deal with him is a de facto officer, even though there may be defects in the manner of his appointment, or he was not eligible for the office, or he failed to conform to some condition precedent to assuming the office." Id.

The foregoing was quoted with approval in State v. Miller, 222 Kan. 405, 414 (1977), where the Court found that a coroner whose term had expired was a de facto officer, since he was in possession of the office and exercising the duties thereof, and the general public and public authorities believed him to be the coroner. Id. at 413, 414. "As a de facto officer his acts were valid insofar as they involved the interest of the public and a third person." Id. at 414. This is in accord with general authorities, as evidenced by the following:

"The de facto doctrine was engrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. In other words, the doctrine rests upon the principle of protection of the public and third parties, and not to protect or vindicate the act or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third

persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid." (Footnotes omitted.) 63 Am.Jur.2d §493.

In our judgment, the de facto doctrine is applicable to the instant situation. The following statement of authority is relevant to such conclusion:

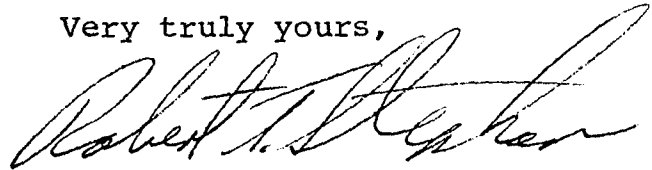
"It is sometimes held that an officer holding over notwithstanding the ending of his tenure by acceptance of an incompatible office is not an officer de facto. But there is also authority supporting the view that the officer, in such circumstances, becomes a de facto officer as to the first office, at least insofar as third persons and the public are concerned. And where constitutional or statutory provisions render an officer ineligible to hold another office, he may be held to be an officer de facto as regards the second office." (Footnotes omitted.) 63 Am.Jur.2d §508.

We believe the better view in this instance is that the office of finance commissioner for the City of Girard has been occupied by a de facto officer since the time the office holder accepted the office of county appraiser. Certainly, he has been in possession of such office under color of authority, and we have not been advised of any facts negating against a finding that the general public and public authorities believed him to be finance commissioner. Thus, we believe that a determination that the finance commissioner was a de facto officer is warranted, particularly since there was no other person claiming title to the office. Such a determination has the effect of validating such person's acts, and we are aware of no adverse effect which will result therefrom. To the contrary, it is our opinion that such determination will adequately protect the public and third parties who have dealt with Girard's governing body these past few months. It is a legally-supportable conclusion which will have salutary practical results by minimizing the disruptive effect this opinion may have upon Girard's governing body.

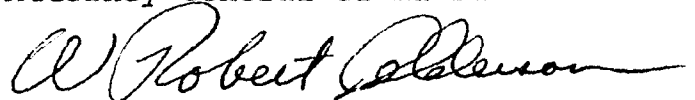
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In summary, it is our opinion that a county appraiser is a county officer, and a member of the board of commissioners of a city of the second class is precluded by K.S.A. 14-1302 from holding such office. Thus, where the finance commissioner of the City of Girard accepted an appointment as the county appraiser for Crawford County, a vacancy was created in the office of finance commissioner. However, such person's continued service as finance commissioner subsequent to his forfeiture of the office, as a matter of law, was as a de facto officer, and all of his acts in such capacity are valid as to the general public and third persons.

Very truly yours,



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