STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 17, 1979

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

ATTORNEY GENERAL OPINION NO. 79-301

James R. Schaefer
Mellor & Miller, P.A.
800 Brown Building
Wichita, Kansas 67202

Re: Drainage and Levies--Watershed Districts--Directors Serving as Employees

Synopsis: A director of a watershed district established pursuant to K.S.A. 24-1201 et seq. may not at the same time be employed by the district as a paid assistant.

* * *

Dear Mr. Schaefer:

As counsel for Middle Walnut Watershed Joint District No. 60, you have inquired of this office concerning the legality of a watershed district director also serving as an employee of the district. Specifically, you ask:

> "May a member of the board of directors of the watershed district also be a paid assistant for purposes of acquiring rights-of-way, easements or other necessary duties for which paid assistants may be employed?"

We would initially note that K.S.A. 1978 Supp. 24-1209 empowers the board of directors of a watershed district to employ "such professional services and other assistance" as they deem essential. You inquire whether a director himself could be employed by the rest of the directors (presumably he would abstain on the vote). In our opinion, public policy considerations require that a director of a watershed district may not be so employed.

K.S.A. 24-1210 sets out the method for selecting the directors of a watershed district, and additionally provides that:

> "Such directors shall serve without compensation, but shall be allowed actual and necessary expenses incurred in the performance of their official duties." (Emphasis added.)

From the above, it is apparent that this is not a situation where the common-law doctrine of incompatibility of offices is applicable, since for the most part that principle deals with situations where an individual holds two offices simultaneously. Although some jurisdictions have applied this common-law doctrine to situations where a public officer is concurrently employed by a public body, the Kansas Supreme Court has as yet not extended the reach of this doctrine to all such situations. However, in Dyche v. Davis, 92 Kan. 971, 977, 978 (1914), the Court did find it appropriate to scrutinize (within the parameters of this doctrine) the conflict created when an officer of one state agency is simultaneously employed by another, and receives compensation from both. Here, the directors are not compensated, nor can the position of employee for the district be termed an "office" so as to meet that requirement. Therefore, the two positions under consideration here do not fit within the framework necessary for application of the common-law doctrine of incompatibility of offices. See, e.g., 63 Am.Jur.2d Public Officers and Employees, §64, pp. 669, 670.

However, Kansas courts have held that it is against public policy considerations for a public officer to enter into a contract with the governmental entity he serves in an official capacity. This principle has been recognized in Kansas since the case of City of Concordia v. Hagaman, 1 Kan.App. 35 (1895), in which a city councilman was employed by the city to do some printing work. The city later refused to pay the bill in full, and the Court held at Syllabus 2 that:

> "In the absence of a penal prohibitive statute, on grounds of public policy alone, an express contract entered into between the mayor and council of a city of the second class and one who is at the time a councilman of such city, for the performance of services for the city, will not be enforced . . . ."

And, at p. 39, the Court held:

> "One of the plaintiffs below, J. M. Hagaman, as councilman, was acting in the capacity as agent or trustee for the city. As such, it was his duty to supervise, and exercise his best judgment upon, all contracts entered into on behalf of the city. It was inconsistent with that duty for him to stipulate as to the terms for doing a thing for the city which his office required that he, as a representative of the city, should see done well and faithfully and on the best terms."

This type of inconsistency has been recognized as well by other jurisdictions in the same context, i.e., a public official enters into an employment contract with the board, agency or department on which he serves. One situation which reoccurs continually is that in which a schoolteacher also serves on the local board of education. As here, the board position is (usually) not compensated, while the position of teacher is in no way an "office." Yet, because of the inherent conflict between the two roles, courts have held that the holding of such dual positions is against public policy (or statutory restrictions where such policy has been codified). See, e.g., Doebler v. Mincemoyer, 446 Pa. 130, 285 A.2d 159 (1971), Visotcky v. City Council, 119 N.J. Super. 263, 273 A.2d 597 (1971), Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973), and Tarpo v. Bowman School Dist. No. 1, 232 N.W.2d 67 (N.D. 1975).

Without any information to the contrary in your letter, we assume in the instant case that, as an employee of the district, such a person would be hired by the board of directors, who would also fix his salary and exercise supervision over him. He, in turn, would report back to the board on a continuing basis. Under these circumstances, for such individual to simultaneously serve as a member of the board of directors creates a conflict in the functions of the two positions, to the extent that the performance of the duties of one interferes in the performance of the duties of the other.

Initially, it could be argued that such employment is not a conflict, based on the wording of K.S.A. 75-4304. That statute, which prohibits public officials from making contracts with the entity which they represent, provides an exception where the officer abstains from taking any action himself on the contract (i.e., if he lets the rest of the board approve it by themselves). To this extent, the strict approach of Hagaman has been modified, perhaps in recognition of the realities of rural life, in which a public agency may be forced to choose from a limited number of suppliers.

However, it is our opinion that, given the kind of continuing supervision which the board would exercise over such an employee and the on-going nature of his duties, K.S.A. 75-4304 is inapplicable in this situation. It is the likelihood of such a continuing conflict which distinguishes these facts from one in which a fixed amount of goods or services are contracted for, delivered or provided, and final payment made. Nor is this situation like that discussed in Attorney General Opinion No. 79-108, in which a bus driver for a school district also served on the board of education. There, the individual's role as bus driver only conflicted with his role as board member once a year at contract time, rather than on a repeated basis. As noted above, school teachers are considered as falling in this latter category, probably because of the extended conflict that would be created during contract negotiations. In our opinion such a continuing conflict would also be present here.

Further, we also find this statute inapplicable for a different reason. Even if the director were to abstain from discussing and voting on matters pertaining to his employment position, such action deprives the voters of the district of a representative who is free to make independent judgments on such matters. In our judgment, constituents of a watershed district board member are entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters properly before the board. In this instance, the continuing conflict resulting from his being concurrently both an officer and employee of the district precludes such representation. Far from having to abstain on just the initial vote concerning whether to hire him, such a director would have to abstain in countless discussions and votes thereafter as well. Additionally, other directors could feel less inclined to criticize the performance of an employee who is also a fellow director.

Accordingly, it is our opinion that for reasons of public policy a director of a watershed district established pursuant to K.S.A. 24-1201 et seq. may not at the same time be employed by the district as a paid assistant.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Jeffrey S. Southard

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk