



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

ATTORNEY GENERAL OPINION NO. 79-304

The Honorable Ben E. Vidricksen
State Senator, Twenty-Fourth District
713 North Eleventh Street
Salina, Kansas 67401

Re: Surplus Property and Public Airport Authority
Act--Members of Authority--Eligibility to
Simultaneously Hold Other Public Office

Synopsis: There are no statutory or constitutional provisions which preclude a person from simultaneously holding the offices of state senator and member of the Salina Airport Authority. Moreover, such simultaneous incumbency is not proscribed by the common law doctrine of incompatibility of offices.

* * *

Dear Senator Vidricksen:

You have asked our opinion whether it is a conflict of interest for you to be a member of the legislature and to simultaneously serve as a member of the Salina Airport Authority. While you have phrased your request in terms of the possible conflict of interest that might result from simultaneously holding both offices, we presume your inquiry was directed toward whether there are any legal prohibitions against such dual office-holding, and we have considered your inquiry within this context.

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The Salina Airport Authority was created pursuant to the authority granted by K.S.A. 27-315 et seq. (Surplus Property and Public Airport Authority Act). Members of an airport authority created pursuant to this act are appointed as provided in K.S.A. 1979 Supp. 27-319. Nothing therein precludes a member so appointed from holding other public office, and our review of the remaining provisions of this act has disclosed no such statutory prohibition.

The essential requirements and constraints regarding a legislator's qualifications and eligibility for office are found in the Kansas Constitution. Section 4 of Article 2 thereof requires only that a legislator be a qualified elector who resides in his or her district, and the succeeding section provides for disqualification of legislative members, as follows:

"No member of congress and no civil officer or employee of the United States or of any department, agency, or instrumentality thereof shall be eligible to be a member of the legislature. Any member of the legislature who accepts any appointment or election contrary to the foregoing shall be disqualified as a member of the legislature."
Kan. Const., Art. 2, §5.

Nothing in the foregoing constitutional provisions has application to your inquiry, and we have discovered no other statutory or constitutional restraints on a member of the legislature holding a local public office of this type.

Thus, absent any pertinent statutory or constitutional provisions, resolution of your inquiry requires application of relevant case law. While the Kansas Supreme Court has not considered the specific question contemplated here, the Court has been called upon in several instances to consider whether the simultaneous holding of two public offices is legally permissible. We have had occasion to review these decisions in a number of this office's recently-issued opinions, and while we do not propose to unduly burden this opinion by reiteration of these prior opinions, we think it appropriate to restate our conclusions regarding the common law doctrine of incompatibility of offices, as applied in Kansas.

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There are two principal cases in Kansas concerning this doctrine. 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,

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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.

In applying the foregoing to your inquiry, we are of the opinion that the common law doctrine of incompatibility of offices does not preclude a person from simultaneously holding the offices of state legislator and member of a public airport authority. In examining the duties and functions of these two offices, we have found no inconsistency therein. In our judgment, the performance of the duties of one office will not interfere with the performance of the duties of the other. Neither office has the power of appointment as to the other office, and neither has supervisory power over the other. Nor is there any indication of a continuing conflict of interest created by such dual office-holding, such that considerations of public policy would render it improper for an incumbent to retain both offices. The respective constituencies of these two offices are not being deprived of a representative who is substantially free to make independent judgments on matters before the public bodies in which he serves. In short, we have found nothing to indicate that the functions and duties of these offices are inherently repugnant.

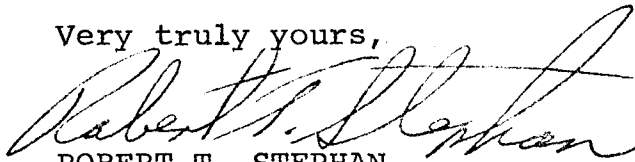
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While it is possible that a conflict of interest may arise when the incumbent of one office is called upon to consider matters affecting his incumbency of the other, as in the instance where the legislature may have before it proposals affecting the airport authority, it is our judgment that such potential conflicts are not of a continuing nature such that there is to be discerned an inherent repugnancy in the functions and duties of the two offices. Conflict of interest is not the touchstone upon which compatibility of offices is to be determined; such determination must be made within the context of the compatibility of the respective functions and duties of the offices.

It is difficult for us to conceive of a public officer who on occasion is not faced with a conflict of interest, whether such arises from having to act upon matters affecting such officer's personal interests or having to make decisions on matters involving family, friends or acquaintances. Such conflicts do not per se create the basis for a person's ineligibility for a particular public office. This fact has been accorded legislative recognition in Kansas through the enactment of the governmental ethics laws (K.S.A. 1979 Supp. 46-215 et seq.). The philosophy embodied by these statutes is that public officers are to disclose conflicts of interest and should deal with such conflicts in a manner that will permit public scrutiny. If such principles are adhered to, a public officer's constituents will be in a position to judge whether such conflicts have been resolved in the public interest. Even though the conflicts addressed by these statutes primarily concern those arising from a public officer's pecuniary interests, we find the philosophy embodied thereby to have relevance to an analysis of the relationship between two public offices held by the same person.

In conclusion, it is our opinion that there are no legal obstacles to your simultaneously holding the offices of state senator and member of the Salina Airport Authority.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

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