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June 17, 1980

ATTORNEY GENERAL OPINION NO. 80-134

Frank H. Jenkins, Jr.
Lenexa City Attorney
129 West Park
P.O. Box 149
Olathe, Kansas 66061

Re: Cities of the Second Class -- Mayor-Council Form of
Government -- Position of Mayor Not Incompatible with that
of State Representative

Synopsis: Neither Kansas statutes nor the common law doctrine of
incompatibility of offices precludes one person from
holding the position of mayor in a city of the second
class having the mayor-council form of government simul-
taneously with that of state representative. Cited
herein: K.S.A. 14-301, 14-1204, 14-1302, 14-1307,
14-1402.

* * *

Dear Mr. Jenkins:

As City Attorney for Lenexa, Kansas, you have inquired concerning
whether a member of a city commission or city council, including the
mayor, may also serve as a state representative at the same time.
While this question is a broad one, we understand that the specific
situation presented here concerns the mayor of a second-class city
having the mayor-council form of government, and the scope of our
opinion will be limited accordingly.

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In the absence of a charter ordinance, cities of the second class in Kansas (of which Lenexa is one) are allowed by statute to have two types of city government. The first, set out by K.S.A. 14-101 et seq. and currently in use in Lenexa, involves a mayor-council system whereby the city is divided into wards from which members of the council are elected. The mayor is elected from the city as a whole, and presides at council meetings, as well as having "the superintending control of all the officers and affairs of the city." (K.S.A. 14-301). The second, found at K.S.A. 14-1101 et seq., provides for a mayor-commission system whereby the commissioners, like the mayor, are elected from the city as a whole (K.S.A. 14-1204). Additionally, the duties of the mayor are less under this system than that above, as he is responsible only for certain city departments (K.S.A. 14-1307), and serves in other respects as a co-equal member of the board of commissioners. (K.S.A. 14-1402).

The distinction between these two systems is critical to this inquiry, for the latter is governed by the provisions of K.S.A. 14-1302, which states that "[n]o member of the board of commissioners shall hold any office of profit under the laws of any state or the United States, or hold any county or other city office." As a state representative position is an "office of profit," this statute would preclude the joint holding of that office by the mayor in such a city. However, we find no similar provision dealing with the mayor-council form of government now in effect in Lenexa. Therefore, this situation would appear to be governed by decisions of the Kansas Supreme Court which state that an individual can hold more than one public office, provided there is no incompatibility between the offices. Dyche v. Davis, 92 Kan. 971 (1914); Congdon v. Knapp, 106 Kan. 206 (1920).

The question of whether the offices of mayor in a city such as Lenexa and state representative are incompatible has not been dealt with specifically by any Kansas case law. However, there are authorities which deal with the problem of incompatibility generally which can be applied here. In Abry v. Gray, 58 Kan. 148 (1897), the Kansas Supreme 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."

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Subsequently, in Dyche v. Davis, supra, 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.

And, in Congdon v. Knapp, supra, the court ruled that "if one person holds two offices, the performance of the duties of either of which does not in any way interfere with the duties of the other, he is entitled to the compensation for both." Id. at 207.

General authorities also provide practical guidance on the types of interference which gives rise to incompatibility. 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.

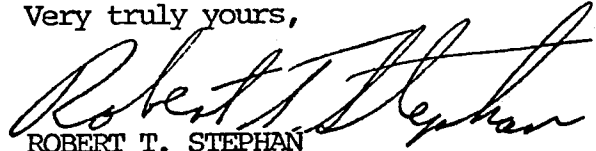
Applying the above to the two offices involved here, it is apparent that no conflict sufficient to find incompatibility exists. A state representative can exercise no supervision of any kind over a mayor of a city, nor can he fix or in any way influence the latter's salary or remove him from office. The duties of the two positions are separate and distinct, leaving no room for possible conflict. Conceivably, a problem might arise through the introduction of legislative measures by the representative aimed at his own city. However, as his vote is only one out of 125, the remoteness of this influence is far short of the type of continuing conflict which is dealt with in the above-cited authorities.

In conclusion, it is our opinion that neither Kansas statutes nor the common law doctrine of incompatibility of offices precludes one person

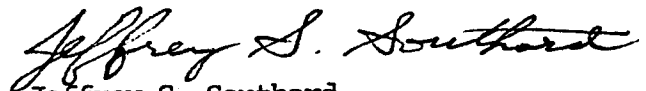
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from holding the position of mayor in a city of the second class having the mayor-council form of government simultaneously with that of state representative.

Very truly yours,



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RTS:BJS:JSS:may