STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

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ATTORNEY GENERAL OPINION NO. 81- 7

Mr. Michael L. Bailey
Executive Director
Kansas Commmission on Civil Rights
535 Kansas Avenue, 5th Floor
Topeka, Kansas 66603

Re: Labor and Industries--Kansas Acts Against Discrimination--Commission on Civil Rights--Personnel Rules Limiting Private Practice of Law

Synopsis: The Kansas Commission on Civil Rights may impose reasonable personnel rules upon its employees, but any such rule may not unreasonably limit a fundamental right of a public employee.

The Commission may, in circumstances justifying the same, dismiss an attorney or hearing examiner for violation of a reasonable and constitutional personnel rule, relating to conflict of interest, adopted by the Commission. Cited herein: K.S.A. 1980 Supp. 75-2949(1); K.A.R. 1980 Supp. 1-9-1 and 1-10-1(a); U.S. Const., Amend. I.

* * *

Dear Mr. Bailey:

You request our opinion as to the legality of two alternative "policies" which the Kansas Commission on Civil Rights is considering for possible adoption. These policies, which would restrict the private practice of law by attorneys employed by the Commission, are included in the appendix to this opinion.

Before considering the provisions of each of the proposed policies, it must be recognized that state agencies do not have unlimited authority to impose conditions and requirements upon state employees. Numerous cases have prescribed the constitutional parameters within which a public agency must operate, and a review of those cases would be helpful prior to considering any restrictions which the commission might seek to impose.

In Keyishian v. Board of Regents, 385 U.S. 589, 605 (1966), it was held that:

> "[T]he theory that public employment which may be denied all together may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

It was also noted that public employment may not be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Id. at 605.

In Pickering v. Board of Education, 391 U.S. 563, 568 (1967), the United States Supreme Court considered the First Amendment rights of a teacher who was dismissed for criticizing the board of education in a letter that was published in a newspaper. The Court stated that the problem, in such a case, is

> "[t]o arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568.

In Perry v. Sindermann, 408 U.S. 593 (1972), another case involving the exercise of First Amendment rights by a teacher, it was held that, regardless of the public employee's contractual or other claim to a job, the government may not withdraw the benefit of public employment on a basis that infringes constitutionally protected interests. Id. at 597. The Court also stated that a college may not refuse to renew a teaching contract as a reprisal for the exercise of constitutionally protected rights. Id. at 598.

In Branti v. Finkel, 445 U.S. 507 (1980), it was held that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs, unless such political beliefs would interfere with the discharge of his public duties." Id. at 583.

In Voichahoske v. City of Grand Island, 231 N.W.2d 124 (Neb. 1975), a city personnel rule which stated that it was prejudicial to the public interest for more than one person in a household to be on the city payroll was considered. It was held that if a personnel rule establishes a system of classification of employees which affects the exercise of a fundamental right (i.e., the right to marry), the rule can only be sustained if it promotes a compelling governmental interest. The case was remanded to the trial court to determine the issue of fact as to whether there was such a compelling governmental interest for the subject personnel rule.

The "compelling governmental interest" test set forth in the Voichahoske case, supra, was rejected in Town of Milton v. Civil Service Commission, 312 N.E.2d 188 (Mass., 1974). The case involved a requirement that applicants seeking employment to a city police force, and who had resided in such city or town for one year prior to filing application for examination, be placed ahead of other applicants on the list of eligible applicants if other things were equal. The Court noted numerous cases, involving the dismissal of public employees, which established that the government may properly discharge an employee for actions which bear a reasonable relation to the job even if those actions involve the exercise of a constitutional right. Id. at 192-193. According to the Court, the same cases also established that, in considering the legality of a dismissal, the test is whether the activity at issue might reasonably be thought to interfere with the duties of the office, and the government is not required to satisfy the compelling state interest test for dismissal. Id. at 193. It was also noted that a state "may not discharge an employee for the sole reason that he has chosen to exercise a constitutional right unless the action also demonstrates an independent job-related reason for dismissal." Id. at 192. In the case at bar, the Court upheld the subject rule giving priority, for purposes of appointment to a city of police force, to residents of the subject city, and stated that the improvement in the effectiveness of the police force might justify such a rule even under the compelling state interest test. Id. at 194.

There are numerous cases which consider the validity of restrictions, imposed upon public employees, with regard to outside employment. Many of these cases are summarized in the annotation at 94 A.L.R.3d 1230. Some of the older cases seem to indicate that an absolute prohibition against outside employment is permissible even where such employment will not interfere with or affect performance of public duties. See MacLellan v. Michigan Dept. of Correction, 129 N.W.2d 861 (Mich., 1964). However, one of the more recent cases holds that an absolute prohibition, in the absence of a

reasonable need dictated by the public interest, violates the Due Process Clause of the Federal Constitution. Crowley Firemen v. City of Crowley, 280 So.2d 897 (La., 1973). Another case indicates that a prohibition against "substantial outside interests" by teachers, during the school year, is reasonably related to the state's interest in maintaining well-run schools, and does not violate the Equal Protection Clause of the United States Constitution. Gosney v. Sonora Independent School Dist., 430 F.Supp. 53 (1977). Finally, as the above-cited annotation indicates, certain restrictions against outside employment by policemen and firemen have been upheld due to the public interest in maintaining police and fire departments which are "fit and ready."

Having summarized the above cited public employment cases, we now consider the subject of imposing restrictions, relative to the private practice of law, upon attorneys employed by the Kansas Commission on Civil Rights. It has been noted in several cases that the opportunity to earn a living or to engage in a common occupation is a fundamental right. Town of Milton v. Civil Service Commission, supra at 192; Armstrong v. Howell, 371 F.Supp. 48, 54 (Nebraska, 1974); Crowley Firemen v. City of Crowley, supra at 902. Although, in our judgment, the Kansas Commission on Civil Rights may impose reasonable personnel rules upon its employees, any such rule may not unreasonably limit, in violation of the Due Process and Equal Protection provisions of the Federal Constitution, a fundamental personal right of a public employee. We must, in accordance with this principle, examine the reasonableness of a rule which would restrict the private practice of law by attorneys employed by the Kansas Commission on Civil Rights.

In our judgment, there would be substantial justification for a personnel rule which would prohibit commission attorneys from prosecuting or defending, except as a part of the attorney's employment by the Commission, civil rights cases. Such a rule would serve to prevent conflict of interest situations which might arise in the course of representing clients in such cases. All authorities are in agreement that the elimination and prevention of conflict of interest is a proper state purpose. Dunphy v. Sheehan, 549 P.2d 332, 334 (Nev., 1976). Such a rule would also prevent the possibility that complaints generated by the operation of a public agency might be used as a "springboard" to establishing a private law practice. We have no doubt that such a limited restriction, relative to the practice of law by commission attorneys, would be reasonable and in the public interest.

However, policy no. 1 (see attached appendix), which is under consideration by the Commission, is not such a limited restriction. Among other things, it is stated that the policy will not permit:

"1. Partnership or other beneficial interest in any corporation, organization or association engaged in the practice of law.

"2. Maintenance of any office in any way identifed as an office for the general or limited practice of law.

"3. Any telephone or local directory listings as an attorney.

"4. Any advertisements or public notices tending to convey the impression that the individual is in the private practice of law."

In our opinion, the restrictions imposed by this policy are overly broad and unreasonably infringe upon the fundamental right of Commission attorneys to engage in their profession. We see no justification for totally prohibiting the practice of law by Commission attorneys, where such practice occurs outside the normal business hours of the Commission and does not interfere with the civil service (whether classified or unclassified) duties of the attorney. Such a broad restriction may not, in our opinion, be constitutionally imposed against attorneys employed by the Commission.

With regard to the second policy being considered by the Commission (see appendix attached), we perceive no constitutional or statutory problem inherent therein. The first paragraph, which requires full-time employees to expend a full forty hours per week in the performance of their assigned duties, is supported by K.A.R. 1980 Supp. 1-9-1. The second paragraph, which proscribes any full or part-time employment which creates a conflict of interest or appearance of a conflict of interest with the employee's duties as an employee of the Commission, is, as has been stated, a proper state purpose. Dunphy v. Sheehan, supra. It should be noted, however, that there are often questions and disagreements as to what is, or is not, a conflict of interest. Therefore, we would recommend that the rule be modified so as to be more specific as to the conduct which is proscribed.

Finally, it is our opinion that a Commission attorney (or hearing examiner) in the classified civil service may, in circumstances justifying the same, be dismissed for violation of a reasonable and constitutional personnel rule, relating to conflict of interest, adopted by the Commission. K.S.A. 1980 Supp. 75-2949(1) provides, in part, that:

> "An appointing authority may dismiss any permanent classified employee when the appointing authority considers that the good of the service will be served thereby . . . ."

K.A.R. 1980 Supp. 1-10-1(a) provides, in part, that a appointing authority may dismiss a permanent employee "for other good cause" when the appointing authority considers that the good of the service will be served thereby. In our judgment, these provisions are sufficient to allow the Commission to propose the dismissal of an attorney (or hearing examiner) in the classified service upon the grounds of a violation of a personnel rule established and published by the Commission. Of course, any such action would be subject to the dismissal procedures of the Civil Service laws and regulations, including a review by the civil service board as to the reasonableness of the dismissal.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Terrence R. Hearshman

Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm
Attachment