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January 23, 1981

ATTORNEY GENERAL OPINION NO. 81- 21

The Honorable Denny D. Burgess
Representative Sixtieth District
Pottawatomie and Wabaunsee Counties
Rt. 1 -- Box 292
Wamego, Kansas 66547

Re: Schools--Members of Board of Education of Unified
School District--Compatibility with Other Offices

Synopsis: There are no statutory obstacles to a member of the board of education of a unified school district simultaneously holding either of the offices of county attorney or municipal judge of a city of the second class. Moreover, the common law doctrine of incompatibility of offices does not preclude either of such simultaneous incumbencies. Cited herein: K.S.A. 19-702, 19-704, 19-705.

* * *

Dear Representative Burgess:

You have inquired whether a member of a board of education of a unified school district may simultaneously hold the office of county attorney (presumably, although your request was not so limited, of a county in which all or a portion of such school district is located). You have further inquired whether a municipal judge of a city of the second class may be elected to a position on the board of education of a unified school district.

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In considering both of your questions, we have discovered no statutory provisions which would compel a negative answer to either of these questions. We have noted the provisions of K.S.A. 19-705 which preclude a county attorney from holding "any judicial or other county office whatsoever." Clearly, a position on a school board is not a judicial office, and this office has consistently advised that such school board position is not a county office. (See, e.g., Attorney General Opinion Nos. 76-127 and 79-255.) Such advice has been predicated, in part, on the case of State v. Fleming, 61 Kan. 90 (1899), in which the Kansas Supreme Court held that high school trustees were not county officers.

With respect to your second question, we also have reviewed pertinent election laws and have found no statutory preclusion of a municipal judge of a city of the second class being a candidate for or being elected to a position on a school district's governing body.

Thus, absent any statutory statement as to the compatibility of these particular offices, resolution of your inquiry depends upon application of the common law doctrine of incompatibility of offices. That doctrine has been defined, discussed and applied in a number of opinions issued by this office (see, e.g., Attorney General Opinion Nos. 79-242, 79-248 and 79-251), and in order to avoid unduly burdening this opinion by a restatement of the principles announced in those prior opinions, we are enclosing copies of the opinions noted above for your consideration. Suffice it to state, though, that all of these opinions concluded that the applicable Kansas cases, as well as pertinent general authorities, indicate that incompatibility of offices requires more than a physical impossibility to discharge the duties of both offices at the same time. Moreover, there must be an inconsistency in the functions of the two offices, to the extent that a performance of the duties of one office 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.

In addition to the opinions of this office noted above and enclosed for your consideration, Attorney General Opinion No. 78-315 has pertinence to your request. In that opinion, Attorney General Curt Schneider concluded that the office of county attorney is not incompatible with the office of a member of a board of education of a unified school district. The basis for such conclusion was stated as follows: "It is clear that the duties of the county attorney in no way operate at cross purposes with the statutory obligations of a board of education,

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and that the two offices are not incompatible because of the respective duties and obligations of the two offices." Id., p. 2. Although stated in a rather summary fashion, it is our opinion that the conclusion expressed in that prior opinion is correct.

We have formed our opinion by applying the principles enunciated in the enclosed opinions, and in so doing have found no inconsistency in the functions of the two offices. In our judgment, the performance of the duties of one office does not interfere with the performance of the duties of the other. However, in reaching this conclusion, we have not been unmindful of Attorney General Opinion No. 79-255, in which we determined that the common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of county commissioner and member of a board of education of a unified school district. Nevertheless, it is our considered opinion that the duties and obligations of a county attorney are distinguishable from those of a county commissioner, such that the application of the principles forming the basis of Opinion No. 79-255 to the situation considered herein produces a different result.

In that prior opinion, we found that the respective duties and obligations of a county commissioner and school board member were such that one person could not "faithfully, impartially and efficiently discharge the duties of both offices." Att'y Gen. Op. No. 79-255, at p. 4. Moreover, it was determined that such simultaneous incumbency offended public policy from the standpoint that

"[e]ven if the incumbent of one office were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the other office, such abstention deprives one constituency or the other of a representative who is free to make independent judgments on such matters." Id.

In distinguishing the foregoing conclusions from the one expressed herein, it should be recognized that a person simultaneously holding the offices of county commissioner and school board member is engaged in making policy decisions, some of which potentially will not be in the best interests of both of his or her respective constituencies. We do not believe that is true of a person simultaneously holding the offices of county attorney and school board member, however, since a county attorney does not exercise similar policy-making authority. Although K.S.A. 19-704 requires a county attorney to "give opinions and advice to" the board of county commissioners and other county officers, the county attorney, in carrying these particular duties, merely serves as a counselor and adviser regarding legal matters in which the county is interested. Even though such advice and counsel may touch upon

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matters of mutual concern to the school board of which the county attorney is a member, we do not find such situations to create an inherent repugnancy in the two offices. Clearly, in these instances, the county attorney is not making policy decisions which might adversely affect one or the other of his or her respective constituencies. Similarly, we find nothing in the performance of the prosecutorial duties ascribed to the county attorney's office (K.S.A. 19-702) that is inherently repugnant to the county attorney's simultaneous service on a school board. Therefore, it is our opinion that the doctrine of incompatibility of offices does not preclude one person from simultaneously holding the offices of county attorney and member of a board of education of a unified school district.

With respect to our consideration of the compatibility of the offices of municipal judge of a city of the second class and member of a board of education of a unified school district, we have found the October 25, 1972, opinion of Attorney General Vern Miller to be of assistance. That opinion considered whether the offices of municipal judge of a third class city and board member of a unified school district are compatible, and concluded thusly: "A comparison of the statutory duties of the respective positions does not suggest that any incompatibility exists which would prevent one individual from holding both offices. It is, accordingly, our opinion that the individual in question may fill both positions at the same time." VII Op. Att'y Gen. 546 (1974).

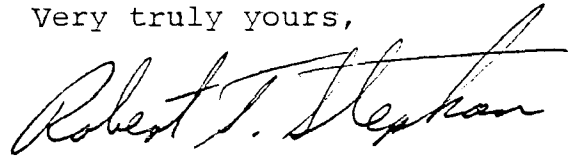
Even though Attorney General Miller's opinion does not relate to the precise issue you have presented, in that one of the offices considered therein was a municipal judge of a third class city, we believe that the conclusion reached therein is equally applicable where the offices are a municipal judge of a second class city and school board member. We have applied the same considerations to these offices that we discussed above with respect to the offices of county attorney and school board member, and we have concluded that there is no inherent repugnancy regarding the respective duties and obligations of these offices. Thus, we have determined that one person may faithfully, impartially and efficiently discharge the duties of both offices.

In summary, therefore, it is our opinion that there are no statutory obstacles to a member of the board of education of a unified school district simultaneously holding either of the offices of county attorney or municipal judge of a city of the second class. Moreover, the common

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law doctrine of incompatibility of offices does not preclude either
of such simultaneous incumbencies.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf
Enclosures:

Attorney General Opinion Nos. 79-242, 79-248 and 79-251