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March 30, 1981

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ATTORNEY GENERAL OPINION NO. 81- 74

Ms. Carol Wertenberger
Norton City Clerk
301 East Washington
Norton, Kansas 67654

Re: Cities of the Second Class -- Mayor-Council Form
of Government -- Incompatibility of Officers
Doctrine; Municipal Judge, Fire Chief, Members of
Volunteer Fire Department

Synopsis: The doctrine of incompatibility of offices precludes one person from holding the position of municipal judge or fire chief while at the same time serving as mayor or city councilman in a city of the second class having the mayor-council form of government. However, a person could hold either of such elective positions and still serve as a member of the volunteer fire department, as such volunteers are neither officers nor employees of the city for the purposes of the doctrine. However, to avoid any potential conflict of interest, a person in such an elected position should abstain in the making of any decisions affecting the compensation of the volunteer firemen, as required by K.S.A. 75-4304. Cited herein: K.S.A. 14-201, 14-301, 14-1204, 14-1302, 14-1307, 14-1402, 75-4301, 75-4304.

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Dear Ms. Wertenberger:

On behalf of the City of Norton, you request our opinion on two questions regarding the simultaneous holding of two city positions by one person. Specifically, you ask whether it is proper: (1) for an individual to be appointed municipal judge while also a member of the city council, or (2) for the fire chief or a member of a volunteer fire department to also

Carol Wertenberger
Page Two
March 30, 1981

serve as city councilman or mayor? You additionally inform us that while the municipal judge and fire chief positions are salaried, the volunteer firemen receive compensation only for each business or practice session attended, and each fire call they respond to.

In the absence of a charter ordinance, cities of the second class in Kansas (of which Norton 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 Norton, 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 extensive 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." However, we find no similar provision dealing with the mayor-council form of government now in effect in Norton. 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 at issue here are incompatible in a city such as Norton 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

Carol Wertemberger
Page Three
March 30, 1981

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, 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 principles to the offices involved here, it is apparent that a municipal judge or fire chief appointed by the mayor and approved by the city council (pursuant to K.S.A. 14-201) would be subject to the latter, thus making the dual holding of both an appointive and an elective position incompatible. Members of the council, in addition to approving such appointees initially, specify their duties and compensation, and can, by ordinance, abolish any office created by them, i.e., fire chief. Clearly, it cannot be said that the simultaneous holding of either of these appointive positions would not "in any way interfere with the duties" of city councilman or mayor. For these reasons, the appointment of

Carol Wertenberger
Page Four
March 30, 1981

a current elected city official to either of these posts would, under Kansas law, result in the ipso facto vacation by the official of the post to which he was elected. The same would be true, but in reverse, if a person who is municipal judge or fire chief was elected mayor or to the council. Abry v. Gray, supra, 58 Kan. at 148-49.

However, in our opinion such a result is not required in the case of a member of the volunteer fire department who is also the mayor or a councilman. Firemen generally have been held not to occupy the status of public officers [16 McQuillin, Municipal Corporations §45.11, 3rd ed. revised (1979)], and the fact that the positions at issue here are volunteer makes it doubtful that the men who fill them could be considered ordinary employees of the city, since they exercise fire-fighting authority only following the receipt of a call. 16 McQuillin, Municipal Corporations, §45.05, 3rd ed. revised (1979). Rather, in our opinion such persons have the legal status of independent contractors who, banded together in an unincorporated association, are paid only on a services-rendered basis. Accordingly, the doctrine of incompatibility of offices would not apply, as that concept is limited to situations involving two offices (Congdon v. Knapp, supra) or an office and a position of employ whose salaries are drawn from the same fund. (Dyche v. Davis, supra)

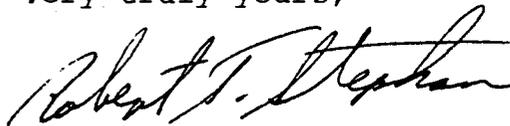
We would, however, add one caveat. Inasmuch as the volunteers are compensated for each run in an amount set by the council, the participation of a councilman/volunteer in deliberations concerning such compensation would create a conflict of interest of the type prescribed by K.S.A. 75-4304. That statute forbids a public officer from participating in the making of contracts in which he or she has a "substantial interest," which is defined at K.S.A. 75-4301 as including the receipt of \$1,000 or more annually in salary, compensation or remuneration. While the possibility of a volunteer fireman receiving this much in one year may be remote, a person faced with such a possibility would be well-advised to abstain in such determinations, and so avoid any problems later. K.S.A. 75-4304(a).

In conclusion, it is our opinion that the doctrine of incompatibility of offices precludes one person from holding the position of municipal judge or fire chief while at the same time serving as mayor or city councilman in a city of the second class having the mayor-council form of government. However, a person could hold either of such elective positions and still serve as a member of the volunteer fire department, as such volunteers are neither officers nor employees of the city for the purposes of the doctrine. However, to avoid

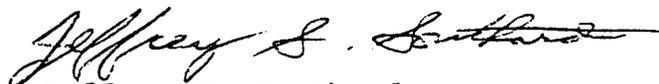
Carol Wertenberger
Page Five
March 30, 1981

any potential conflict of interest, a person in such an elected position should abstain in the making of any decisions affecting the compensation of the volunteer firemen, as required by K.S.A. 75-4304.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle