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April 8, 1981

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ATTORNEY GENERAL OPINION NO. 81-88

Ms. April Brown
City Clerk
Manchester, Kansas 67463

Re: Cities of the Third Class--Election, Appointment
and Removal of Officers--Eligibility to Office;
Conflict of Interest

Synopsis: Persons who are related, and who are otherwise qualified, may serve concurrently as members of the governing body of a city of the third class having a mayor-council form of government. Similarly, a person related to a member of any such city's governing body may hold the office of city clerk in such city, if the person is otherwise qualified to be appointed to the office.

An arrangement whereby certain members of such city's governing body perform compensated maintenance services for the city may create a conflict of interest subject to scrutiny under K.S.A. 75-4304, which proscribes self-dealing contracts by public officers and employees, or if such arrangement creates an employment relationship, it would be proscribed by the doctrine of incompatibility of offices, if the city council members also are compensated for serving in such capacity. Cited herein: K.S.A. 1980 Supp. 12-105a, 12-105b, K.S.A. 13-2903, 15-204, 15-209, 75-4301, 75-4304, 75-4306.

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Dear Ms. Brown:

You indicate that the mayor and city council of Manchester have requested you to inquire of this office regarding several matters concerning the officers of such city. It is our understanding that Manchester is a city of the third class, having a mayor-council form of government.

First, you have inquired whether "two members of the same family" may serve on the city council at the same time. We are unaware of any statutory prohibition against persons who are related concurrently serving as members of the governing body of a third class city having a mayor-council form of government. K.S.A. 15-209 prescribes the qualifications of the elected officers in such a city, requiring only that they be qualified electors of such city. Accordingly, since we know of no other legal principle that would preclude relatives being members of the same municipal governing body, we are of the opinion that, as long as such persons are otherwise qualified, persons who are related may concurrently serve as members of Manchester's governing body.

A similar response is required for your second question as to whether it is legally permissible for a member of Manchester's city council to be related to the city clerk of such city. Pursuant to K.S.A. 15-204, the city clerk is an appointive officer of a third class city having the mayor-council form of government, and the qualifications thereof also are specified in K.S.A. 15-209, being only that appointive officers must be qualified electors of the city. Exceptions are made for certain of the city's appointive officers, but such exceptions are not pertinent here.

The statutes governing third class cities with a mayor-council form of government do not contain a provision similar to K.S.A. 13-2903, which disqualifies relatives of the mayor or any commissioner in first class cities having the commission form of government from holding any city office during the mayor's or commissioner's term of office. Thus, absent any similar statutory prohibition applicable to the situation you have posed, and being unaware of any other principle of law precluding such officeholding, it is our opinion that a person related to a member of Manchester's city council may hold the office of city clerk in such city, if the person is otherwise qualified to be appointed to the office.

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Finally, you have inquired whether it is permissible for members of the city council to charge the city an hourly wage for maintenance work for the city, e.g., maintenance work on city streets and water lines, since the city has no maintenance employees.

Because we are not apprised of all the factual circumstances surrounding your request, we cannot provide you with a definitive response to your request. However, based on certain alternative assumptions as to the pertinent facts, we can suggest several possible answers to this inquiry.

Initially, we must assume that the city council has acquiesced to the performance of these maintenance services by various members of the council, thereby providing an adequate basis for the city paying their claims for compensation. See K.S.A. 1980 Supp. 12-105a, 12-105b. From your statement of the facts, it would appear that the city's acquiescence was accomplished either through specific agreements or by virtue of employment relationships.

Assuming that the maintenance work performed by these council members is a contractual service, we believe the provisions of K.S.A. 75-4304 are applicable. This statute provides:

"(a) No public officer or employee shall in his or her capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he or she is employed or in whose business he or she has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business. A public officer or employee does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract.

"This section shall not apply to the following:

"(1) Contracts let after competitive bidding has been advertised for by published notice; and

"(2) Contracts for property or services for which the price or rate is fixed by law.

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"(b) Any public officer or employee who is convicted of violating this section shall forfeit his or her office or employment."

The obvious purpose of this statute is to prevent self-dealing contractual arrangements by public officers and employees. In our judgment, any contractual arrangement by the city council with any of its members to provide maintenance work for the city could be subject to scrutiny under this section. That is, it would appear that any such contract would be one in which the council members in question would have a "substantial interest" in a "business." These quoted terms are defined in K.S.A. 75-4301, and we commend them to your attention. But, to avoid unduly burdening this opinion, we will not quote them here, although noting it would seem quite probable that performing contractual maintenance services for the city would constitute a "business interest" in which the respective council members involved would have substantial interests.

Thus, based on that assumption, if council members who contract with the city are to avoid the sanctions prescribed by K.S.A. 75-4304 (forfeiture of office) and 75-4306 (class A misdemeanor), the contract must be one removed from the purview of K.S.A. 75-4304 by subsection (b) thereof, or such council members must not have made or participated in the making of the contract. Please note, in this regard, that the last sentence of K.S.A. 75-4304(a) states: "A public officer or employee does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract."

On the other hand, your reference to the "hourly wage" paid to these council members for maintenance work suggests the possibility that an employment relationship exists. In that event, and if the City of Manchester provides compensation to persons serving on its city council, we believe that the doctrine of incompatibility of offices precludes service in the dual capacity of officer and employee of the city.

There are two principal Kansas cases concerning the incompatibility of offices. 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

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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.

It is important to note, and pertinent to your inquiry, that this common law principle is, for the most part, limited to situations involving the simultaneous holding of two public offices, as opposed to public positions. The general rule is stated thusly:

"The prohibition against one person holding more than one office at the same time is referenced to offices as distinguished from positions in public service that do not rise to the dignity of office. It does not extend to a position which is a mere agency or employment." (Emphasis added.) 63 Am.Jur.2d Public Officers and Employees §64 at 669, 670.

Although some jurisdictions have now enlarged this doctrine to include both public offices and public employment without restriction (see 70 A.L.R. 3rd 1188), the majority of states follow the traditional rule. See 63 Am.Jur.2d Public Officers and Employees §64, at 669, 670. While the Kansas Supreme Court has for the most part adhered to the majority rule, in Dyche v. Davis, supra, the Court applied the doctrine to a situation where a public officer also held a position of public employment and the compensation for the public office and employment were both payable from public funds. 92 Kan. at 977. Thus, if council members do not receive compensation for service on the city council we see no application of the doctrine enunciated in Dyche v. Davis, supra. However, if council members are compensated by the city for service in such capacity, an employment relationship must be scrutinized in light of this common law doctrine.

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In reading together the previously cited Kansas cases, 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, 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 incumbent 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 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.

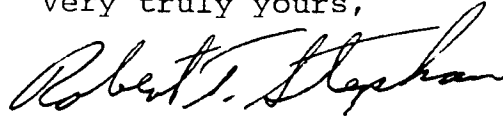
With these principles in mind, we would advise that our assumed employment relationship would be contrary to the doctrine of incompatibility of offices. It would place the council members

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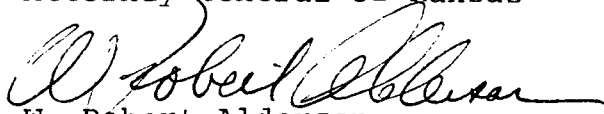
in question in the position of supervising their own work as employees, as well as passing upon the amount of compensation to be paid for such work, a situation clearly precluding these individuals from faithfully and impartially discharging the functions and duties of both positions.

Although incomplete knowledge of the facts regarding your third question has precluded a specific response, we trust that the foregoing legal considerations can be readily applied to the factual situation with which you are confronted.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:jm