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ATTORNEY GENERAL OPINION NO. 81-178

Charles E. Webb, Mayor  
City of Oxford  
Oxford, Kansas 67119

Re: Cities of the Third Class -- Mayor-Council Form  
of Government -- Incompatibility of Offices;  
Councilman Serving as Police Commissioner

Synopsis: In a city of the third class with a mayor-council  
form of government, the existence of an ordinance  
creating the municipal office of police commis-  
sioner is a condition precedent to the appointment  
of an officer to fill that position. However, the  
doctrine of incompatibility of offices precludes  
a council member from concurrently serving as police  
commissioner in the event such office has been  
lawfully established. Cited herein: K.S.A. 15-204.

\* \* \*

Dear Mr. Webb:

You have requested an opinion as to whether the mayor of a  
third class city which has a mayor-council form of government,  
may appoint a council member to serve as police commissioner.

Provision for election, appointment and removal of officers  
in third class cities with a mayor-council form of government  
is found in K.S.A. 15-204, which states in pertinent part:

"The mayor, with the consent of the council,  
may appoint . . . the following city officers,  
to wit: A municipal judge of the municipal  
court, a clerk, a treasurer, a marshal-chief  
of police, policemen, street commissioner, and  
such other officers as deemed necessary; and  
may retain a licensed professional engineer  
to act in the capacity of city engineer for

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specifically defined duties. The duties and pay of the various officers provided for in this section shall be regulated by ordinance." (Emphasis added.)

The foregoing statute does not expressly provide for appointment of a "police commissioner," but does permit appointment of "other officers as deemed necessary." We believe these provisions may fairly be construed as authorizing the appointment of a police commissioner. Accordingly, since there are no statutes prohibiting a third class city from having a police commissioner, it is our opinion that a police commissioner may be appointed if the mayor and council deem it necessary.

However, this conclusion must be understood in light of the general rule that a person may not be appointed to a city office that is not constitutionally or statutorily created, unless there is an ordinance creating the office and specifying the duties of its incumbent. Numerous courts have considered this question and almost unanimously agree that the establishment of a municipal office, as well as the duties, term and salary thereof, must precede the appointment of the officer and must be the product of the legislative machinery of a city which has sole authority to enact municipal ordinances. "Except for statutory officers, it is established that the adoption of an ordinance creating an office is a sine qua non to the appointment of an officer by the governing body." Planning Board of the Township of West Milford v. Township Council, 123 N.J. Super. 135, 142, 301 A.2d 781, 784 (1973). See also Ex parte Boalt, 123 Or. 1, 260 P. 1004 (1927); Stout v. Stinnett, 210 Ark. 684, 197 S.W. 2d 564 (1946).

Since the city of Oxford presently has no city ordinance creating the office of police commissioner, the mayor may not appoint a police commissioner. However, even if such an ordinance were passed, the appointment of a council member to fill the office of police commissioner would be improper. Although there is no specific statutory prohibition against such appointment, the common law doctrine of incompatibility of offices, in our opinion, would preclude it.

In Abry v. Gray, 58 Kan. 149 (1897), the Kansas Supreme Court cited and adopted the critical language of 19 American and English Encyclopedia of Law, 562, as follows:

"The incompatibility . . . 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

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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, the Court in Dyche v. Davis, 92 Kan. 971 (1914), 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. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices."  
Id. at 977.

At 63 Am.Jur.2d, Public Officers and Employees, §74 (1972) it is noted:

"One of the most important tests as to whether officers are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to the other's re-visory power. Thus, two offices are incompatible where the incumbent of one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote."

Applying these principles to the offices involved in your request, we must conclude that a police commissioner appointed by the mayor and approved by the city council (pursuant to K.S.A. 15-204) would be subordinate to and subject to the powers of the latter. The council members have the statutory authority not only to consent to the appointment of "other officers," but also to remove the same as provided in K.S.A. 15-204 which provides in part:

"A majority of all the members of the council may remove any such officer; or, for good cause, the mayor may remove any such officer, with the consent of the council."

As a member of the city council the individual in question is in a position to vote on the approval of his own appointment, to vote upon an ordinance fixing his pay and duties,

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and to vote upon any question involving his removal. The inconsistency and repugnancy of these functions should be readily apparent. Moreover, we believe that considerations of public policy render it improper for an incumbent to retain both offices. Even if the councilman were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the office of police commissioner, such abstention deprives the constituency such person serves as councilman of a representative who is free to make independent judgments on such matters.

In our opinion, such constituency is entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters. In reaching this conclusion, we recognize that under a commission form of government, one of the city commissioners would have the statutory duty of supervising the police department. However, the distinction between that situation and the one you have posed is that, pursuant to the commission form of government, the duties in question are assigned to a single office, while you have inquired whether such duties may be performed by a single person who is the incumbent of two separate and distinct offices. The former does not give rise to the question of incompatibility of offices, while the latter does.

In addition, under the mayor-council form of government, the executive and administrative powers are generally given to the mayor and the legislative power is vested in the council. 2 McQuillan Municipal Corporations §9.17. K.S.A. 15-301 et seq. establishes the powers and duties of mayors in third class cities with a mayor-council form of government consistent with this general rule. Since the council has only legislative authority, a council member would have no authority to act in an executive capacity. This is in contrast to a commission form of government in which all legislative and executive powers are vested in the commission, thereby permitting individual commissioners to assume administrative control of municipal departments.

Because of this lack of executive authority of the council, we are concerned about your statement regarding the appointed duties of each council member. You state that "each member have [sic] appointed duties - Electric and Fire - Water, Environment and Solid Waste - Streets and Alleys - Airport and Farm - Parks, Public Health and Pool Board." If these duties involve functional operational and supervisory duties, we believe such assigned duties improperly give executive authority to the council. However, if these assignments are merely an informal division of subjects designated for the purpose of having at least one

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council member knowledgeable in certain areas, but no administrative duties are imposed, such assignments would be permitted.

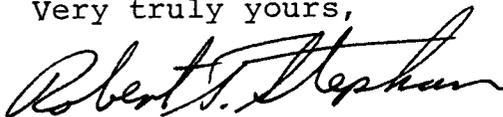
In our opinion, before council members could assume executive duties, it would be necessary for the city of Oxford to adopt a charter ordinance exempting the city from the provisions of the Kansas statutes which define the powers and duties of the mayor and council in third class cities. Alternatively, the city could change to a commission form of government pursuant to K.S.A. 15-1201 et seq. to allow imposition of such duties.

You also inquire whether the chief of police would be directly accountable to the "police commissioner" who in turn would be answerable to the mayor. In view of the foregoing analysis, this question is moot. However, Attorney General Opinion No. 80-240 may provide some guidance as to the accountability of the chief of police. We observed therein regarding the interpretation of K.S.A. 15-204 as follows:

"By this statute, it is clear that the mayor, 'with the consent of the council,' is vested with lawful authority to remove the chief of police from office 'for good cause.' More importantly, though, the statute gives to the council itself an unrestricted power to remove the chief of police from office. Thus, this officer serves at the pleasure of the council."

In summary, municipal offices can be created only by passage of a city ordinance, and not by resolution or mere appointment. If an ordinance were passed creating the office of police commissioner, a council member could not be appointed to that position because of the doctrine of incompatibility of offices and because such appointment would constitute an improper assignment of executive power to a council member.

Very truly yours,



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