



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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December 21, 1981

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ROBERT T. STEPHAN
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 81-284

Ms. Dorothy K. White
Sedgwick County Clerk
525 North Main, Room 211
Wichita, Kansas 67203

Re: Counties and County Officers -- County Clerks --
County Clerk as Candidate for County Commission

Synopsis: A county clerk may be a candidate for the office of county commissioner while retaining the office of county clerk. However, K.S.A. 1980 Supp. 19-205 precludes a county commissioner from holding any other county office. Thus, if a county clerk were elected to the office of county commissioner, the acceptance of the latter office would ipso facto vacate the former. Cited herein: K.S.A. 1980 Supp. 19-101a, 19-205, 19-301, K.S.A. 19-2609, K.S.A. 1980 Supp. 25-4301, K.S.A. 75-714.

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Dear Ms. White:

You have requested an opinion from this office as to whether a county clerk may run for the office of county commissioner without first surrendering the office of county clerk. In addition, you ask whether the board of county commissioners may pass a resolution acting under county home rule powers which could force you to resign as county clerk, once your candidacy is declared, if no state law requires such resignation.

K.S.A. 1980 Supp. 19-205 states in pertinent part:

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"No person holding any state, county, township, or city office shall be eligible to the office of county commissioner in any county in this state."

In DeMaree v. Scates, 50 Kan. 275 (1893), the Kansas Supreme Court interpreted the word "eligible" in the context of a similar election statute. The Court quoted Privett v. Bickford, 26 Kan. 52 (1881), saying:

"'This provision operates upon the capacity of the person to take office rather than a disqualification to be elected to an office . . . ' If the statute is a prohibition merely against any person holding any state, county, township, or city office . . . from being elected to the office of county commissioner, then a person eligible at the election, that is capable of being legally chosen might be elected to the office of county commissioner, and afterwards accept a state, county, township or city office . . . A person may, therefore, hold the office of county commissioner even if, when elected, he is disqualified under the provisions of the statute. If he becomes qualified after the election and before the holding, it is sufficient." 50 Kan. at 279.

Therefore, by virtue of K.S.A. 1980 Supp. 19-205, and the foregoing judicial decisions, an incumbent county clerk is not precluded from being a candidate for the office of county commissioner. Should the county clerk win a position on the board of county commissioners, however, acceptance of said office vacates the office of county clerk, ipso facto. See Moore v. Wesley, 125 Kan. 22, 24 (1928) and Attorney General Opinion No. 79-256.

You also ask whether the board of county commissioners, by acting under home rule power, could require the county clerk to resign such office if the clerk is a candidate for county commissioner. It is impossible to provide a definitive response to this inquiry, since you have not advised us as to what (if any) action might be contemplated by the county commission. However, it would appear that, irrespective of whether such action would take the form of a direct prohibition of your candidacy or the imposition of an additional qualification for the office of county clerk that would render

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you ineligible to continue in office, any such action would be beyond the county's statutory power of home rule. K.S.A. 1980 Supp. 19-101a in pertinent part sets forth county home rule powers, as follows:

"Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions: First, counties shall be subject to all acts of the legislature which apply uniformly to all counties seventh, counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and the election of county officers."

Initially, it is to be observed that any action by the county commission which would compel your resignation or render you ineligible to continue serving as county clerk would have the effect of shortening your statutorily prescribed term of office. For this reason alone, we believe such action is beyond the scope of a county's home rule powers, since K.S.A. 1980 Supp. 19-301 is uniformly applicable to all counties in prescribing a term of four years for county clerks. Equally important, however, is the fact that any action by the county commission which would effect a shorter term of office or prescribe qualifications for the office would, in our judgment, relate directly to the election of a county officer in contravention of K.S.A. 1980 Supp. 19-101a, seventh, quoted above.

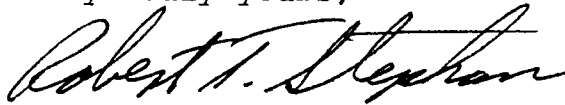
Finally, we note the legislature has prescribed various methods by which an elected official may be removed from office. These methods include ouster (K.S.A. 60-1205, 60-1206), recall election (K.S.A. 1980 Supp. 25-4301 et seq.) and forfeiture for neglect or nonperformance of official duties (K.S.A. 19-2609). If the county commission sought to utilize any of these methods to remove you from office, the commission could not vary from the statutory provisions, since each is applicable uniformly to all counties.

Therefore, it is our opinion that a county clerk may be a candidate for county commissioner while retaining the office of county clerk. However, should the county clerk be successful

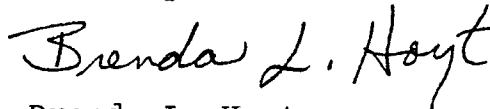
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in such candidacy, the office of county clerk would be vacated upon acceptance of the office of county commissioner.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Hoyt
Assistant Attorney General

RTS:BJS:BLH:hle