ATTORNEY GENERAL OPINION NO. 82-49

The Honorable Wayne C. Riggs
Mayor
P. O. Box 87
McCune, Kansas 66753

Re: Cities of the Third Class -- Mayor-Council Form of Government -- Mayor Acting as Dog Catcher

Synopsis: The mayor of a city of the third-class having the mayor-council form of government is not precluded by statute or by the common-law doctrine of incompatibility of offices from also performing the functions of a dog catcher, when such duties are vested in him by city ordinance and do not result in any additional compensation being paid to him. Cited herein: K.S.A. 15-301, 15-1402, 15-1407, 15-1502.

Dear Mr. Riggs:

As mayor for the City of McCune, Kansas, you request our opinion on a question concerning your ability to simultaneously act as the city’s dog catcher. You inform us that you have been given the duty to impound any domestic animal (including dogs) found running at large. (McCune City Ordinance No. 366.) In light of prior opinions of this office which indicate that it is improper (under some circumstances) for one person to hold two city offices at the same time, you wish to know whether you may lawfully act under the ordinance as it now reads.

In the absence of a charter ordinance, cities of the third class in Kansas (of which McCune is one) are provided an option by statute as to the form of city government they may have. The first, set out by K.S.A. 15-101 et seq. and currently in use in McCune, involves a mayor-council system
whereby the mayor is elected from the city as a whole, pre-
sides at council meetings, and has "general supervision over
the affairs of the city." K.S.A. 15-301. The second, found
at K.S.A. 15-1201 et seq., provides for a mayor-commission
system whereby the duties of the mayor are less extensive
than under the first system, as he is responsible only for
certain city departments, including the fire department,
(K.S.A. 15-1407), and serves in other respects as a co-equal
member of the board of commissioners. K.S.A. 15-1502.

The distinction between these two systems is relevant to this
inquiry, for the latter is governed by the provisions of
K.S.A. 15-1402, which states that:

"Neither the mayor nor any commissioner shall
be elected or appointed to any office created
by, or the compensation of which was increased
or fixed by, the board of commissioners while
he or she was a member thereof, until the ex-
piration of at least two years after such per-
son has ceased to be a member of said board."

Under the facts as you present them, this statute does not
apply to McCune, in that a mayor-council, as opposed to a
mayor-commission, form of government is in existence. Fur-
thermore, no such statute exists for mayor-council cities.
However, the absence of any specific statute on this point
does not preclude the application of decisions of the Kansas
Supreme Court which do not permit an individual to hold more
than one public office if there is an "incompatibility" between
the offices. Dyche v. Davis, 92 Kan. 971 (1914),

The incompatibility doctrine applies in those cases where two
public offices are held by the same individual at the same
time. 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
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 considera-
tions of public policy, for one person to re-
tain both.'" Id. at 149.

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.

In our opinion, the doctrine does not apply in this situation, in that two offices are not being held by the same person. Rather, in your position as mayor, you have been given an additional duty to enforce an ordinance of the city which deals with the impounding of stray animals. This is consistent with K.S.A. 15-301, which authorizes the mayor to be "active and vigilant in enforcing all laws and ordinances" of the city. Further, as there is no separate office, no additional compensation is being paid for the animal control duties imposed by the ordinance. This avoids any conflict of interest which could be created by your holding the office of mayor and so being in a position to influence decisions on salary for the animal control position.

In conclusion, the mayor of a city of the third-class having the mayor-council form of government is not precluded by statute or by the common-law doctrine of incompatibility of offices from also performing the functions of a dog catcher, when such duties are vested in him by city ordinance and do not result in any additional compensation being paid to him.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeffrey S. Southard
Assistant Attorney General