



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 111

Commissioner Johnnie Brown
Crawford County Courthouse
Girard, Kansas 66743

Re: Counties and County Officers -- County Commissioners;
Powers and Duties -- Eligibility of County Employee
to Serve as County Commissioner

Synopsis: The common law doctrine of incompatibility of offices may be utilized to scrutinize the propriety of one person simultaneously being a public officer and public employee, where such person is compensated for both positions from public funds. Application of such doctrine to the situation where an individual is a county commissioner and simultaneously an employee of the county creates an incompatibility in the functions and duties of such positions.

Therefore, a county employee, serving as a part-time sewer inspector, may not simultaneously serve as a county commissioner of the county by which he is employed. There is an inherent functional incompatibility between the two positions because the prospective county commissioner would be in a position to, inter alia, determine the rate of compensation and supervise his own work as a sewer inspector. Cited herein: K.S.A. 19-205.

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Dear Commissioner Brown:

You inform this office that an individual presently employed by Crawford County as a part-time sewer inspector, is considering filing for the office of Crawford County Commissioner. Your correspondence states that the individual in question is a civil servant and works under the supervision of the county's

health officer. You have requested our opinion as to whether this individual may simultaneously serve as a county commissioner and county sewer inspector. A resolution of this issue requires an analysis of whether either statutory or common law prohibitions preclude the simultaneous holding of the office of county commissioner and the employment position of county sewer inspector.

The only possible statutory prohibition to holding the two subject public positions simultaneously is K.S.A. 19-205, which states in pertinent part:

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

The prohibition of K.S.A. 19-205 is directed to simultaneous dual public office holding as distinguished from public employment. Hence, a determination of what is a "public office" and who is a "public officer," are relevant to your inquiry. These issues were discussed in Sowers v. Wells, 150 Kan. 630 (1934). There the Court stated:

"While the authorities are not in complete harmony in defining the term 'public office' or 'public officer,' it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.'" Id. at 633.

Under this definition it is clear that a county commissioner is a public officer. However, a sewer inspector, supervised by the county's health officer, is not "exercising some definite portion of sovereign power." Therefore, an individual employed as a sewer inspector does not hold a public office, and the prohibition of K.S.A. 19-205 is not applicable. See, also, Bassler v. Gordon, 119 Kan. 40 (1925), Jagger v. Green, 90 Kan. 153 (1913), State v. Rose, 74 Kan. 262 (1906), State v. Hawkins, 257 P.411 (Mont. 1927), and Attorney General Opinion No. 79-108.

It is important to note, and pertinent to your inquiry, that the common law doctrine of incompatibility of offices 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, 92 Kan. 971 (1914) 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, since county commissioners are compensated by the county for service in such capacity, an employment relationship must be scrutinized in light of this common law doctrine.

There are two principal Kansas cases which analyze the common law doctrine of incompatibility of offices when both offices are compensated from public funds. In Abry v. Gray, 58 Kan. 148 (1897), the Court adopted the 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 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." Id. at 149.

This doctrine was also discussed in Dyche v. Davis, supra. There 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. This is something more than a mere 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.

The above-quoted portions of Abry and Dyche are in accord with general authorities which discuss this common law doctrine. In 89 A.L.R.2d 632 the doctrine is described as follows:

"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." (Emphasis added.) (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.

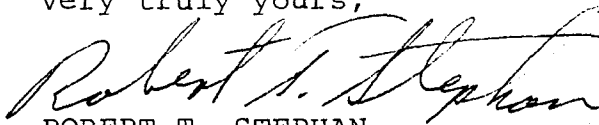
A factual situation similar to that raised by your opinion request was the subject of Attorney General Opinion No. 81-88. There certain members of the city's governing body performed compensated maintenance services for the city. The opinion cited the principles discussed in Dyche and Abry and stated that such an employment relationship would be contrary to the doctrine of incompatibility of offices. The opinion stated further that:

"[I]t [the employment relationship] would place the council members in question in the

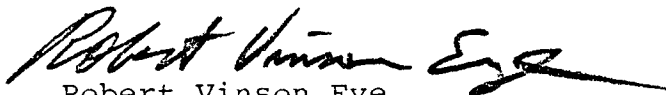
position of supervising their own work as employees, as well as passing upon the amount of compensation to be paid for such work, a situation clearly precluding these individuals from faithfully and impartially discharging the functions and duties of both positions."
[See also Attorney General Opinion No. 79-215.]

Therefore, it is our opinion that the common law doctrine of incompatibility of offices precludes an individual from serving as a county commissioner and, at the same time, an employee of such county.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Robert Vinson Eye
Assistant Attorney General

RTS:WRA:RVE:hle