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ATTORNEY GENERAL OPINION NO. 82-174

Mr. Michael K. Johnston  
Pratt City Attorney  
Municipal Building  
Pratt, Kansas 67124

Re: Cities and Municipalities--Commission-Manager  
Form of Government--Simultaneous Holding of  
Offices of City Manager and City Treasurer

Synopsis: The common law doctrine of incompatibility of  
offices precludes one person from simultaneously  
holding the offices of city manager and city  
treasurer in a city of the second class having a  
commission-manager form of government. Cited  
herein: K.S.A. 12-1001, 12-1011, 12-1014, 12-1024.

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Dear Mr. Johnston:

On behalf of the City Manager of the city of Pratt, you  
request our opinion as to whether the offices of City Manager  
and City Treasurer, in a city of the second class with a  
commission-manager form of government, are compatible.

The provisions of K.S.A. 12-1001 to 12-1020 provide for the  
adoption of the commission-manager plan, and for the ap-  
pointment of a city manager in cities adopting such plan.  
Additionally, K.S.A. 12-1011 and 12-1014 prescribe the powers  
and duties of the city manager in a city with the commission-  
manager form of government. However, neither of these statutes,  
nor any other statute of which we are aware, addresses the

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subject of your inquiry. Thus, resolution thereof requires application of the common law doctrine of incompatibility of offices.

There are two principal Kansas cases concerning 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 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.

In addition, in Congdon v. Knapp, 106 Kan. 206 (1920), 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.

Thus, in reading these cases together, 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,

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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 or 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.

Similarly, in 63 Am.Jur.2d Public Officers and Employees §74, it is stated:

"One of the most important tests as to whether offices 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 revisory power. Thus, two offices are incompatible where the incumbent of the 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." (Footnotes omitted.)

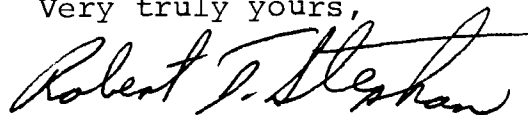
We believe that the above-quoted test relating to subordinate and superior offices is applicable here. Under K.S.A. 12-1014,

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a city manager (in a commission-manager city) has the power to "appoint and remove all heads of departments, and all subordinate officers and employees of the city." The same statute also provides that the city manager "shall be responsible for the discipline of all appointive officers, and may, without notice, cause the affairs of any department or the conduct of any officer or employee to be examined." Thus, the city manager exercises supervisory power over the city treasurer, and also may appoint, remove and discipline such officeholder. Under these circumstances, it is our opinion that the office of city treasurer is subordinate to the office of city manager, and that the common law doctrine of incompatibility of offices precludes one person from simultaneously holding both offices.

In passing, we note that K.S.A. 12-1024 specifically authorizes the city manager of a city adopting the council-manager form of government to "perform the duties and act as the head of any department for which he or she is qualified," and to "designate one person to be the head of two (2) or more departments or offices of the city." This statute is in derogation of the common law doctrine of incompatibility, which doctrine would not allow a city manager to simultaneously hold a subordinate office over which he or she exercises supervisory power. See discussion, above. Although statutes in derogation of the common law must be liberally construed to promote their object, O'Grady v. Potts, 193 Kan. 644, 647 (1964), the provisions of K.S.A. 12-1024 are applicable only to cities with the council-manager form of government, and do not authorize a city manager to simultaneously hold an incompatible office in a city with the commission-manager form of government.

Very truly yours,



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