



STATE OF KANSAS

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September 27, 1982

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ATTORNEY GENERAL OPINION NO. 82-216

Mr. Scott Corsair  
Mayor of Bazine  
P. O. Box 43  
Bazine, Kansas 67516

Re: Cities of the Third Class -- Election, Appointment,  
Removal of Officers -- Simultaneous Holding of City  
Council and Township Board Offices

Synopsis: The common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of city councilman in a city of the third class and a township officer in the township which contains such city. Attorney General Opinion No. 75-50 is withdrawn. Cited herein: K.S.A. 15-104, 25-1606, 80-1502, L. 1982, ch. 63.

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Dear Mr. Corsair:

As Mayor of the city of Bazine, you have inquired whether it is lawful for an individual to hold positions on both the council of the city and the board of Bazine Township simultaneously. You state that two of the present members of the city's five person council are also members of the township board, having been elected to the latter offices prior to assuming these on the council. Problems have arisen, you inform us, in the course of negotiations between the two bodies over a fire protection agreement by which the city provides such services to the township, in that the two dual office holders continue to participate in the discussion as city council members, thus leaving the township with only one remaining officer.

There are two principal Kansas cases concerning the 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.

Also, 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.

It is apparent from a reading of these cases 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, 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.

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In reviewing previous opinions of this office on the subject of incompatibility of offices, we note that Attorney General Harold Fatzer had occasion to review a situation identical to that here, i.e. common holding of township and third-class city council positions. In an opinion dated March 25, 1951, he stated:

"It is our view that these two offices would be incompatible and that it would not be proper for one person to serve in both capacities. It can readily be seen that the performance of the duties of one of the offices might readily interfere with the performance of the duties of the other. This the Supreme Court defines as incompatible offices and prohibits the same person from holding both."

In addition to the considerations discussed in that prior opinion, we also note the reasoning expressed in Attorney General Opinion No. 79-248, in which we concluded that the offices of city commissioner of a city of the second class and board member of a unified school district are incompatible. There, in noting that these offices served overlapping constituencies, we stated:

"[T]he respective duties and functions of these two offices are inherently inconsistent and repugnant, to the extent that one person cannot faithfully, impartially and efficiently discharge the duties of both offices. Furthermore, we believe that considerations of public policy render it improper for an incumbent to retain both. Even if the incumbent of one office were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the other office, such abstention deprives one constituency or the other of a representative who is free to make independent judgments on such matters. It is our opinion that the constituencies of both offices are entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters." Id. at 6,7.

In our opinion, the same considerations of public policy expressed in these two prior opinions are applicable here. While an opinion issued by Attorney General Schneider (No. 75-50) found no incompatibility between these two particular offices, in that each has different functions and responsibilities which do not overlap, such a conclusion is clearly

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at odds with your experience and our view of Kansas law. (Attorney General Opinion No. 75-50 is hereby withdrawn.) Further, we note that in addition to overlapping interests in the area of fire protection (K.S.A. 80-1502), other conflicts could arise in matters involving the intangibles tax (L. 1982, ch. 63), cemeteries (K.S.A. 12-1401 et seq.) and hospitals (K.S.A. 80-2113 et seq.).

While it is arguable that a city councilman could avoid any conflict by abstaining from voting on the matters pertaining to the township, we believe the public policy considerations noted in Opinion No. 79-248 negate such argument. In our judgment, the city councilman's constituency is entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters. Thus, the councilman's abstention from voting on matters concerning the township would deprive his or her constituency of a representative who is free to make independent judgments on such matters. In that residents of Bazine are also eligible to vote for the township officials (K.S.A. 15-104), the same considerations apply there as well.

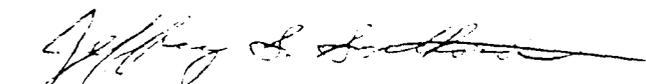
Having thus determined the incompatibility of the public offices under consideration, the question arises as to the effect of such determination. In those Kansas cases where it has been determined that two public offices held by the same person are incompatible, the Court has held that such person's acceptance of the second office ipso facto vacates the first office held by such person. See, e.g., Gilbert v. Craddock, 67 Kan. 346, 362, 363 (1903), and Moore v. Wesley, 125 Kan. 22, 24, 25 (1928). The application of this legal principle here would result in the two involved officials vacating their positions on the township board, as they assumed these posts prior to being elected to the city council. Such vacancies would then be filled by the county commission pursuant to K.S.A. 25-1606.

In conclusion, the common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of city councilman in a city of the third class and a township officer in the township which contains such city.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
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