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January 21, 1983

ATTORNEY GENERAL OPINION NO. 83- 9

Mr. Nick A. Tomasic
District Attorney
Wyandotte County Court House
710 North Seventh
Kansas City, Kansas 66101

Re: Cities of the First Class -- City of Kansas City -- Councilman Simultaneously Holding Other Office

Schools -- Community Colleges -- Trustee Simultaneously Holding Other Office

Synopsis: The common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of member of the Board of Trustees of Kansas City, Kansas Community College and city councilman for the city of Kansas City, Kansas.

* * *

Dear Mr. Tomasic:

You have advised that a current member of the Board of Trustees of the Kansas City, Kansas Community College "has filed as a candidate for a position of councilman with the newly changed form of government for the city of Kansas City, Kansas," and you have inquired whether such person, if elected as councilman, could simultaneously hold that office and the office of trustee of the community college.

Initially, we have reviewed the relevant statutes to determine whether there is a statutory prohibition of such dual office holding. We have found no such prohibition in the statutes pertaining to community college trustees. Similarly, we find no such prohibition from the perspective of the position of city councilman. Here, we note that the city of Kansas City has enacted Charter Ordinance No. 84 which exempted the

city from the application of various statutes having pertinence to the form of government in such city. Moreover, in your letter you note "[t]here is no specific limitation in the Kansas City, Kansas Ordinances against dual office holding." Having reviewed Charter Ordinance No. 84, we concur with your observation, noting only that section 2.8 of the charter ordinance prohibits a member of the city council from holding any other city office. It deserves no discussion to note that the office of trustee of a community college is not a city office.

In our judgment, therefore, there are no statutory or local legislative obstacles to a person simultaneously holding the offices in question. Thus, a resolution of your inquiry requires a determination of whether these offices are incompatible.

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, 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.'" Id. at 149.

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.

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 the 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.

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.)

In applying the foregoing to your inquiry, it is our opinion that the offices in question are incompatible. While we have been unable to discover any specific instance where one office is vested with a direct or indirect supervisory power over the other, it is our judgment that, because of the nature and duties of the two offices, the functions of these offices are inconsistent.

Our conclusion is predicated, in part, by the fact that these offices have overlapping constituencies. A person holding both offices is confronted with the duty of faithfully, impartially and efficiently discharging the duties of these offices in the best interests of the respective constituencies. There are numerous instances in which such person may be called upon to make decisions on matters where the interests of the respective constituencies therein will not be identical.

Of particular significance are the matters of taxation and the issuance of general obligation bonds. Both the community college and the city have the power to levy ad valorem taxes and to issue bonds backed by the obligation to levy taxes in support thereof. We submit that the exercise of such powers by one such governmental body will not necessarily be in the best interests of the other.

Similarly, both the community college and the city are empowered to acquire real property, and are vested with the power to exercise the right of eminent domain in furtherance thereof. Thus, where any property so acquired by the one also is situated within the territorial jurisdiction of the other (which will always be the case with property acquired by the city), such property will be exempt from ad valorem taxation, thereby reducing the tax base of both governmental units. While this may be acceptable to the governmental unit acquiring such property, because of the expected advantages to be derived from the property, can it reasonably be argued that it will always be consonant with the other governmental unit's interest in maintaining its tax base? Further, will the acquisition and development of property by the community college necessarily be in harmony with the city's authority to regulate land use through its planning and zoning powers, or will such regulation of land use by the city always be consistent with the community college's plans for development? Comparable questions may be raised with respect to the exercise of the city's urban renewal powers. In our opinion, all of the foregoing questions must be answered in the negative.

Without unduly burdening this opinion by recitation of further examples of overlapping responsibilities, suffice it to state that, in our judgement, the foregoing examples sufficiently demonstrate that the 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.

As noted in Anderson v. City of Parsons, 209 Kan. 337 (1972),

> "a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public." Id. at 341.

Even though the foregoing statement was made within the context of the Court's consideration of conflicts between a public officer's private interests and his public duties, we believe it has equal application to the situation considered here. Because of the undivided duty a public officer owes to his constituency, we do not believe the law sanctions a mitigation of that duty because of conflicting interests, irrespective of whether such conflict is generated by private interests or the duty owed to another public constituency as a result of the acceptance of a second elective office.

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). Such principle would be applicable here, and should the person who is now serving as a trustee of the community college be elected to and accept the office of city councilman, he would ipso facto vacate his position as a member of the community college's board of trustees.

In conclusion, therefore, it is our opinion that the common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of member of the Board of Trustees of the Kansas City, Kansas Community College and city councilman for the city of Kansas City, Kansas.

Very truly yours,

Robert T. Stephan

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