



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

January 18, 1985

ATTORNEY GENERAL OPINION NO. 85- 8

Judy A. Reid  
City Clerk  
City of Brewster  
Box 147  
Brewster, Kansas 67732

Re: Cities of the Third Class--Powers and Duties of  
Mayor--General Powers and Duties of Mayor;  
Incompatibility of Offices

Synopsis: The common law doctrine of incompatibility of offices does not preclude one person from simultaneously holding the offices of deputy sheriff and mayor of a third class city having the mayor-council form of government. Cited herein: K.S.A. 15-301, 15-308, K.S.A. 1984 Supp. 19-805, K.S.A. 19-812, 19-813.

\* \* \*

Dear Ms. Reid:

On behalf of the governing body of the City of Brewster, you have inquired whether the offices of mayor and deputy sheriff are incompatible, so as to preclude the simultaneous holding of both offices by one person.

The powers and duties of the mayor in a city of the third class with the mayor-council form of government are prescribed by K.S.A. 15-301, which statute provides as follows:

"The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided,

and none other, and shall have general supervision over the affairs of the city. The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he or she shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty."

A deputy sheriff is appointed by the sheriff to assist in carrying out the duties of the sheriff's office. (K.S.A. 1984 Supp. 19-805.) Those duties include preserving the peace and serving process and orders issued by lawful authority. (See K.S.A. 19-812 and 19-813.)

As we are unaware of any statute which addresses the propriety of one person holding the offices of mayor and deputy sheriff, resolution of your inquiry 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.

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.

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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, 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.

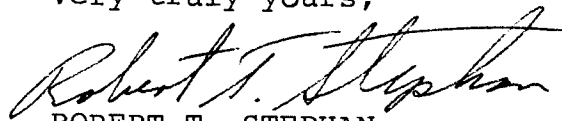
Similarly, in 63 Am.Jur.2d, Public Officers and Employees §74, it is stated:

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"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 re-visory 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.)

Applying the above-stated tests to the question you have posed, we find no incompatibility in one person holding the offices of mayor and deputy sheriff. The duties of the two offices are quite harmonious, since both are concerned with preserving the peace and enforcing laws. (See K.S.A. 15-308, 19-813.) Further, neither officer supervises or has control over the continued employment of the other. Therefore, in our judgment the common law doctrine of incompatibility of offices does not preclude one person from simultaneously holding the offices of deputy sheriff and mayor of a third class city having the mayor-council form of government.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:jm