



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 6

The Honorable Susan Roenbaugh
State Representative, 114th District
Capitol Building, 181-W
Topeka, Kansas 66612

Re: Counties and County Officers -- County
Commissioners; Powers and Duties -- Eligibility to
Office of Commissioner

Synopsis: A county Commissioner is not precluded from holding
a concurrent position as property appraiser with
the Division of Property Valuation. Since a
property appraiser is not a "public officer," such
employment would not result in a situation
prohibited by K.S.A. 19-205. Cited herein: K.S.A.
19-205; 21-3110.

* * *

Dear Representative Roenbaugh:

As state representative for the 114th District of the House
of Representatives, you request our opinion as to whether
certain state employment would result in a holding of offices
which is prohibited by K.S.A. 19-205. Specifically, you
inquire as to whether a county commissioner can be employed as
a property appraiser by the Division of Property Valuation.
You inform us that the position would involve supervising
county reappraisal efforts in a multi-county area, but would
not involve the home county of the county commissioner.

K.S.A. 19-205 deals with eligibility to the office of county
commissioner, and states:

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

Thus, the issue presented is whether a property appraiser for the Division of Property Valuation is a state officer. Several Kansas Supreme Court cases have addressed the issue of how to distinguish a public office from a public employee. In Sowers v. Wells, 150 Kan. 630 (1939), the Court was asked what is a public office and who is a public officer? 150 Kan. at 633. In response, the Court answered:

"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.'" 150 Kan. at 633.

See also Steere v. Cupp, 226 Kan. 566, 572 (1979). Two years before Sowers, the Supreme Court of Kansas in Miller v. Ottawa County Comm'rs, 146 Kan. 481, 485 (1937), observed:

". . . as a general rule . . . a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

Further, the Court stated:

"The distinction between an officer and an employee is that the responsibility for results is upon one and not upon the other. There is also upon an officer the power of direction, supervision and control." Miller, supra at 484.

Thus, the Court distinguished a public officer from a public employee on the basis of the responsibility of each. A public officer has responsibility for results, while an employee is subordinate to the legal authority of another. The Kansas Court has also described a public Office as a public trust which the incumbent holds for a term and tenure prescribed by law. State ex rel. v. Rose, 74 Kan. 262, 267 (1906).

In addition to Kansas case law, general legal authority and Kansas statutes provide assistance in determining when the nature and duties of a position require it to be deemed a public office rather than public employment. The Miller court quoted language from 53 A.L.R. 595 in describing a public office:

"It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements.'" 146 Kan. at 485.

A public officer is defined in 63 Am.Jur.2d, Public Officers and Employees §1, p. 625, as such:

"A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract."

Although contained in the criminal code, K.S.A. 21-3110 provides additional insight into the distinction between a public employee and a public officer. The statute states in relevant part:

"(18) 'Public employee' is a person employed by or acting for the state or by or for a county, municipality or other subdivision or governmental instrumentality of the state for the purpose of exercising their respective powers and performing their respective duties, and who is not a 'public officer.'

"(19) 'Public officer' includes the following, whether elected or appointed:

"(a) An executive or administrative officer of the state, or a county, municipality or other subdivision or governmental instrumentality of or within the state.

"(b) A member of the legislature or of a governing board of a county, municipality, or other subdivision of or within the state.

"(c) A judicial officer, which shall include a judge of the district court, juror, master or any other person appointed by a judge or court to hear or determine a cause or controversy.

"(d) A hearing officer, which shall include any person authorized by law or private agreement, to hear or determine a cause or controversy and who is not a judicial officer.

"(e) A law enforcement officer.

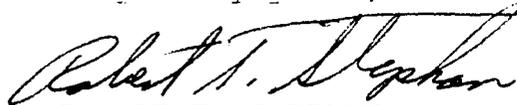
"(f) Any other person exercising the functions of a public officer under color of right."

In applying the foregoing principles and statutes to your inquiry, it is our opinion that a property appraiser does not hold a public office, but rather is a public employee. An appraiser's duties do not involve the exercise of any amount of sovereign power. Further, an appraiser is not ultimately responsible for his acts; rather, the Division of Property Valuation supervises and directs each appraiser as an

employee, and is ultimately responsible for the results of any acts he or she might perform. In addition, we note that an appraiser has no definite term and tenure prescribed by statute; rather, his work is intermittent depending upon the demand for his services.

For these reasons, it is our opinion that a county commissioner is not precluded from holding a concurrent position as property appraiser with the Division of Property Valuation. Since a property appraiser is not a "public officer," such employment would not result in an incompatible dual office holding which is prohibited by K.S.A. 19-205. The fact the commissioner would not be performing appraisal duties in his home county is immaterial, as the issue is solely determined by whether a property appraiser is defined as a public officer or a public employee.

Very truly yours,



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RTS:JSS:BPA:crw