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ATTORNEY GENERAL OPINION NO. 86- 41

Bill Seaman
Chairman of the Board
Osage County Rural Water District No. 4
Route 1
Waverly, Kansas 66871

Re: State Departments; Public Officers and Employees --
Conflict of Interests -- Public Officers and
Employees Prohibited From Making Certain Contracts;
Inapplicable Where Governmental Unit is Employer

Synopsis: A director of a rural water district may be
employed by the district in a position which does
not involve an exercise of the sovereign power of
the district. Neither K.S.A. 75-4304, relating to
conflicts of interests, nor the common law doctrine
of incompatibility of offices would preclude such
employment. Cited herein K.S.A. 75-4303a; 75-4304.

* * *

Dear Mr. Seaman:

As Chairman of the Board of Osage County Rural Water
District No. 4, you request our opinion concerning the
eligibility and qualifications of the board of directors.
Specifically, you inquire whether an officer and director of
the water district may serve as a district employee without
creating a conflict of interest. The specific jobs involved
include bookkeeper and operator of a pumping station.

Generally, "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. If he acquires any interest adverse to those of the public, without a full disclosure it is a betrayal of his trust and a breach of confidence." Anderson v. City of Parsons, 209 Kan. 337, 341 (1972); United States v. Carter, 217 U.S. 286 (1908). An attempt to exercise public powers improperly is null and void. 63A Am.Jur.2d Public Officers and Employees, §319 (1985).

Kansas has codified these general rules on conflicts of interests. See K.S.A. 75-4301 et seq. Specifically, K.S.A. 75-4304 states:

"No public officer or employee shall in his or her capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he or she is employed or in whose business he or she has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business. A public officer or employee does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract."
(Emphasis added.)

A public officer or employee is any person holding public office in the state of Kansas or an employee of the state or any municipal or quasi-municipal corporation. A rural water district board member is a public officer, and any person working for the district would be deemed to be an employee. Whether such officers or employees fall under the conflicts of interests statutes depends upon whether the rural water district is a "person or business" which employes the director or is a "business" in which he or she has a "substantial interest."

This question has been presented on several different occasions to the Kansas Public Disclosure Commission and its predecessor, the Kansas Governmental Ethics Commission. By statute, the commission is empowered to issue advisory opinions on the application of the conflict of interests law.

K.S.A. 75-4303a. In at least four prior opinions, the commission has found that governmental entities are not persons or businesses as these terms are used in K.S.A. 75-4304. As a result, a person is not precluded by this statute from being employed by a unit of government, while at the same time serving on the governing commission, council or board. Opinion Nos. 75-64, 79-12, 80-10, 84-7.

Since the commission has concluded that no statutory conflict of interest is presented by an employee serving as a member of a governing board, this opinion may be focused on possible common law principles which may preclude such action. To our knowledge, the applicable common law principle is the doctrine of incompatibility of offices. In applying the doctrine, courts have traditionally held that a person is barred from holding two incompatible public offices. The general rule has been stated thusly:

"The prohibition against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not rise to the dignity of office. It does not extend to a position which is a mere agency or employment." (Emphasis added.) 63 Am.Jur.2d Public Officers and Employees §64, pp. 669, 670.

Although some courts have now enlarged this doctrine to include both public offices and public employment (see 70 A.L.R. 3d 1188), the majority of states follow the traditional rule. (See 63 Am.Jur.2d Public Officers and Employees §64, pp. 669, 670.) Unfortunately, the Kansas Supreme Court has not had occasion to address this issue. For that reason, we will not speculate whether our court would deviate from the traditional common law rule and expand it so as to include positions of public employment, as well as public offices.

Thus, the determination of what is a "public office" and who is a "public officer," are relevant to your inquiry. These questions were directly in issue in Sowers v. Wells 150 Kan. 630 (1934). There the court said:

"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.' (Cites omitted.)" (Emphasis added.) Id. at 633.

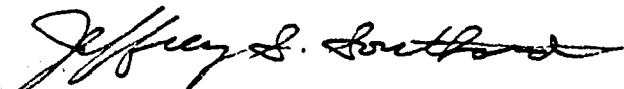
Under this definition, there can be no question but that a member of the board of directors or an officer of the district is a public officer. However, as important to the workings of the district as a bookkeeper or a pump station operator may be, such positions cannot be said to exercise some definite portion of sovereign power. In this context, an office exercising "sovereign power" refers to a position which has a definite term of office, either through election or appointment, which is created by statute or otherwise, and which exercises authority to make decisions or otherwise determine how public policy is to be shaped. Thus, one who is employed in such positions does not hold public office. Consequently, the common law doctrine of incompatibility of offices does not apply, as only one public office is involved.

In conclusion, a director of a rural water district may be employed by the district in a position which does not involve an exercise of the sovereign power of the district. Neither K.S.A. 75-4304, relating to conflicts of interests, nor the common law doctrine of incompatibility of offices would preclude such employment.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
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RTS:JSS:crw