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ATTORNEY GENERAL OPINION NO. 87- 65

Lewis S. Carter, Clerk
Kansas Supreme Court
Kansas Judicial Center
Topeka, Kansas 66612-1507

Re: Constitution of the State of Kansas--
Judicial--Selection of Justices of the Supreme Court

Synopsis: Under the provisions of Article 3, §5 of the Kansas Constitution, no member of the Supreme Court Nominating Commission shall, while he or she is a member, hold any other "public office" by appointment. The term "public office" refers to the common-law concept of a public office, and except where the office of city attorney has been stripped of all prosecutorial and other sovereign power (through the exercise of home rule powers), a city attorney holds a public office. Cited herein: Kan. Const., Article 3, §5.

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Dear Mr. Carter:

You request our interpretation of subsection (g) of Article 3, §5 of the Kansas Constitution. Specifically, you ask whether a person who has been appointed to the position of city attorney by a city manager, and presently holds that office, qualifies to be an attorney member of the Supreme Court Nominating Commission.

Article 3, §5 of the Kansas Constitution provides for establishment of the Supreme Court Nominating Commission, with subsection (g) providing as follows:

"No member of the supreme court nominating commission shall, while he is a member, hold any other public office by appointment or any official position in a political party or for six months thereafter be eligible for nomination for the office of justice of the supreme court. The commission may act only by the concurrence of a majority of its members." (Emphasis added.)

The term "public office," as used in the above-quoted constitutional provision, apparently refers to the common-law concept of a public office. That concept was discussed at length in Durflinger v. Artiles, 234 Kan. 502 (1983), where the court noted that it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of a public office. Id. at 502. Other characteristics of a public office include the following: powers defined by the legislature or through legislative authority; duties performed independently without control of superior power other than law; and some permanency and continuity. Id. at 503.

Application of the above criteria would generally appear to confirm that a city attorney holds a public office. Specifically, a city attorney, as part of the duties of that position, is often called upon to advise the city governing body concerning legal affairs of the city, draft proposed ordinances and resolutions for the governing body, draft and review contracts proposed for the city, and act otherwise as an adviser and counselor. In this capacity, the city attorney does not exercise any independent sovereign power of the city, but merely serves as its counselor or adviser. As a prosecutor, however, the city attorney does exercise, in the name of the city, independent power (prosecutorial discretion), prosecuting (in the name of the city) offenses against its ordinances and codes. While it would be possible, through the exercise of home rule powers, to strip the city attorney of all prosecutorial power and vest such power in a municipal prosecutor (see Attorney General Opinion No. 83-134), we doubt that such action has been taken in many Kansas cities.

In summary, under the provisions of Article 3, §5 of the Kansas Constitution, no member of the Supreme Court Nominating Commission shall, while he or she is a member, hold any other "public office" by appointment. The term "public office" refers to the common-law concept of a public office, and except where the office of city attorney has been stripped of all prosecutorial and other sovereign power (through the exercise of home rule powers), a city attorney holds a public office.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
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RTS:JLM:TRH:jm