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May 25, 1990

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ATTORNEY GENERAL OPINION NO. 90-59

The Honorable Phil Martin
State Senator, Thirteenth District
403 W. Euclid
Pittsburg, Kansas 66762

Re: Cities of the First Class--Board of Commissions--Filling Vacancies in the Office of Mayor or Commissioner

Synopsis: Under the common law general rule, it is against public policy for an officer to use his official appointing power to place himself in office, and all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint. In our judgment, this rule applies to filling vacancies in the office of mayor or commissioner under K.S.A. 1989 Supp. 13-1806, and remaining members of the board of commissioners are not eligible for appointment to a vacant commission seat. Additionally, a remaining member does not become eligible for appointment to a vacant commission seat by resigning the position he currently holds on the board of commissioners. Cited herein: K.S.A. 1989 Supp. 13-1806.

* * *

Dear Senator Martin:

You request our opinion regarding a situation which has arisen in the city of Pittsburg. Specifically, you indicate that there is a vacancy on the city commission and ask whether a current member of the commission, who was elected to a two-year term, may be appointed to serve the unexpired

four-year term. Additionally, you ask whether such member would be eligible for appointment if he resigned from the commission seat which he currently holds.

The city of Pittsburg is a city of the first class governed by K.S.A. 13-1801 et seq. and has adopted the city manager plan. K.S.A. 1989 Supp. 13-1806 relates to vacancies in the office of mayor or commissioner, and provides that in the case of any vacancy "the board of commissioners, by a majority vote of all the remaining members thereof, shall elect some eligible person to serve in such for the balance of the unexpired term of such office." The statute also provides that the city attorney is to break any deadlock where the board of commissioners cannot agree upon an appointment. Under K.S.A. 13-1801, members of the board of commissioners must be citizens of the United States and qualified electors of the city, and K.S.A. 13-1802 provides, in part, that no member of the board of commissioners or the mayor, shall hold any county or other city office.

While none of the above-cited statutory provisions clearly indicate that a member of the board of commissioners is ineligible for appointment to a vacant commission seat, the common law general rule establishes such ineligibility. That rule may be stated as follows:

> "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint. Similarly, a member of an appointing board is ineligible for appointment by the board, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when the appointment was made, and notwithstanding his term in the appointing body was about to expire. The result cannot be accomplished indirectly by his resignation with the intention that his successor shall cast his vote for him." 67 C.J.S. Officers §23 (citations omitted).

One of the first cases to adopt the above-quoted rule was Meglemery v. Weissinger, 131 S.W. 40 (Kentucky 1910). Meglemery was a member of the appointing body which appointed him to the office of bridge commissioner. Three days after his appointment, his term of office on the appointing board expired, thus he was only holding one office. He was subsequently removed from the office of bridge commissioner and he brought suit seeking reinstatement; the court refused reinstatement, relying on the aforesaid general rule stating:

> "As Meglemery was on December 31, 1909, a member of the body that appointed him to fill this place, the appointment was void for reasons of public policy that are both sound and sufficient. And so we have held that in cases like this the fiscal court cannot appoint one of its members to a place that carries with it duties and compensation . . . nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to any office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under

> obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied." 131 S.W. at 41.

In our judgment, the above-quoted common law rule is based on strong public policy, and to override such a policy there must be an explicit statutory directive. The common law rule appears to apply in Kansas [see State v. Dean, 103 Kan. 814 (1918)], and none of the provisions of K.S.A. 13-1801 et seq. explicitly override the rule. Accordingly, in our judgment, the common law rule applies to filling vacancies in the office of mayor or commissioner under K.S.A. 1989 Supp. 13-1806, and remaining members of the board of commissioners are not eligible for appointment to a vacant commission seat.

In addition, as the above-quoted common law rule indicates, the resignation of a remaining member of the commission does not affect his eligibility for appointment to a vacant commission seat. This situation was considered by the Supreme Court of Delaware in State v. McDaniel, 157 A.2d 463 (Del. 1960). In that case, a vacancy existed in the office of mayor of the city of New Castle, and one of the members of the city council had been appointed by the council to fill the vacancy. There was a statute which prohibited this action and to avoid the statute, McDaniel resigned as a member of the council and left the council room. He was then nominated and elected by the council to the office of mayor. Although this action met the requirements of the statute, the court ousted McDaniel from the office relying on the philosophy of the common law general rule, stating as follows:

> "Both the common law and the statute demand that the power of appointment be exercised fairly and impartially. In order to obtain this purpose it is important that the deliberations of the

> appointing body not only be free from wrong doing but free from suspicion of wrong as well. For this reason the general law has been laid down - reinforced in many instances by appropriate statute - that it is contrary to public policy to permit a board to exercise its power of appointment by designating someone from its own body. Such purpose cannot be obtained when the appointee as a member of the appointing body has the opportunity for a closer association and influence upon the members much greater than would be the case where the persons considered for appointment were not members of the appointing body." 157 A.2d at 466. (Citations omitted.)

In accordance with the above-cited authorities, and in summary, it is our opinion that under the common law general rule, it is against public policy for an officer to use his official appointing power to place himself in office, and all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint. In our judgment, this rule applies to filling vacancies in the office of mayor or commissioner under K.S.A. 1989 Supp. 13-1806, and remaining members of the board of commissioners are not eligible for appointment to a vacant commission seat. Additionally, a remaining member does not become eligible for appointment to a vacant commission seat by resigning the position he currently holds on the board of commissioners.

Very truly yours,

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