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ATTORNEY GENERAL OPINION NO. 91- 86

The Honorable Donna L. Whiteman
State Representative, One Hundred Second District
P.O. Box 11
Hutchinson, Kansas 67504

Re: Cities of the First Class; Commission
Government--Board of Commissioners--Holding Other
Office; State Representative

Elections--Filling Vacancies in Offices and
Candidacies--Procedure for Filling Vacancy in
District Office Other Than Judge of District Court;
District Convention; Time

Legislature--State Governmental Ethics--Opinions;
Incompatibility of Offices; State Representative
and Member of Board of Commissioners of City of the
First Class; State Representative and President of
Registered Lobbying Group

Synopsis: A district convention held to elect a person to be appointed to fill a vacancy in a district office is subject to K.S.A. 1990 Supp. 25-3902. The county chairperson must, within 10 days of receipt of notice that a vacancy has occurred or will occur, call a convention by mailing a notice to the persons designated in subsection (b) or (c) of K.S.A. 1990 Supp. 25-3902. The convention is to be convened and held as soon as is reasonable and practicable after the appropriate time as set forth in subsection (b) or (c) has elapsed. An actual vacancy need not exist before the convention is called and held.

K.S.A. 13-1802 precludes a member of the board of commissioners of a city of the first class from simultaneously serving as a state representative.

The common law doctrine of incompatibility of offices does not preclude an individual from simultaneously serving as a state representative and as president of a registered lobbying group. However, the ability of an individual to simultaneously serve in both roles is subject to the findings of the Kansas commission on governmental standards and conduct. Cite herein: K.S.A. 13-1802; K.S.A. 1990 Supp. 25-3902; 25-3903a; 46-160; K.S.A. 46-254; K.S.A. 1990 Supp. 75-4303a, as amended by L. 1991, ch. 150, § 42.

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Dear Representative Whiteman:

As representative for the one hundred second district, you request our opinion regarding the following questions:

1. May a district convention called for the purpose of electing a person to fill a vacancy in the office of state representative be held more than 10 days after the county chairperson has received notice of the vacancy?

2. May an individual simultaneously serve as a state representative and as a member of the board of commissioners of a city of the first class?

3. May an individual simultaneously serve as a state representative and as president of the League of Municipalities, a registered lobbying group?

I. May a district convention called for the purpose of electing a person to fill a vacancy in the office of state representative be held more than 10 days after the county chairperson has received notice of the vacancy?

A member of the house of representatives may resign from office by filing a written notice of resignation in the office of the secretary of state. K.S.A. 1990 Supp. 46-160. Upon receiving notice of such resignation, the secretary of state is required to notify: (1) the governor; (2) the speaker of the house of representatives; and (3) the county chairperson

of the political party required to call the convention for the election of a person to be appointed to fill the vacancy. The convention will be called pursuant to K.S.A. 1990 Supp. 25-3902.

The interpretation of a statute is a question of law and it is the function of the court to interpret the statute to give it the effect intended by the legislature. U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources, 247 Kan. 519, 524 (1990). The cardinal rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature govern when the intent can be ascertained from the statute. State ex rel Stephan v. Kansas Racing Commission, 246 Kan. 708, 719 (1990). In construing statutes, the legislative intent must be determined from a general consideration of the entire act. Id. Courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. Watkins v. Hartsock, 245 Kan. 756, 764 (1989).

K.S.A. 1990 Supp. 25-3902(a) states in part:

"Except as provided in K.S.A. 25-312a and amendments thereto when a district convention is provided by law to be held to elect a person to be appointed to fill a vacancy in a district office, the county chairperson designated in subsection (b) or (c), within 10 days of receipt of notice that a vacancy has occurred or will occur, shall call a convention of all committeemen and committeewomen of the party of the precincts in such district for the purpose of electing a person to be appointed by the governor to fill the vacancy."

Subsections (b) and (c) of that statute then designate the manner in which the county chairperson is to call the convention.

"(b) If the district lies within a single county, the county chairperson of such county shall call the convention by mailing a notice, at least seven days before the date of the convention, to each precinct committeeman and committeewoman

who is entitled to vote at the convention pursuant to subsection (e).

"(c) If all or part of more than one county lies within the district, the county chairperson of the most populous such county shall call the convention by mailing a notice of the convention to each county chairperson of the party in each such county at least 10 days before the date of the convention. Such county chairperson, within three days after receipt of such notice, shall mail notice of the convention to the committeemen and committeewomen in their counties who are entitled to vote at the convention pursuant to subsection (e)." K.S.A. 1990 Supp. 25-3902. (Emphasis added.)

Therefore, after considering all of the provisions of the statute, it is clear that the county chairperson must, within 10 days of receipt of notice that a vacancy has occurred or will occur, call the convention by mailing a notice to the appropriate persons designated in subsection (b) or (c) of K.S.A. 1990 Supp. 25-3902. The notice of such convention must state: (1) the place where the convention is to be held; (2) the time when the convention will convene; and (3) the purpose for which the convention is to be held. K.S.A. 1990 Supp. 25-3902(d).

While K.S.A. 1990 Supp. 25-3902 establishes a 10-day period in which the convention is to be called, the statute does not establish a time limit in which the convention is to be convened and held. If the district lies within a single county, the county chairperson must call the convention at least seven days before the convention convenes; if the district is comprised of more than one county, ten days must be permitted to elapse between the date of calling the convention and the date set for convening the convention. Although the applicable statutes do not establish a time limit for filling such a vacancy nor penalties or other provisions for failure to fill a vacancy, public policy requires that such vacancies in public office be filled as soon as is reasonable and practicable to avoid leaving the office unoccupied for any extended period. Attorney General Opinion No. 84-33.

With the adoption of amendments set forth in L. 1990, ch. 130, it no longer is necessary for a vacancy in a district office to exist before the convention is called and held.

"When a written resignation from a district office as defined in K.S.A. 25-3901 and amendments thereto has been filed with the secretary of state or other officer provided by law, and at the time it is filed there is [sic] 10 or more days before it is to become effective, the county chairperson responsible for calling a convention for the purpose of filling the vacancy thereby created may call and hold the convention without further delay." K.S.A. 1990 Supp. 25-3903a.

The statute makes it clear that the convention may be held to fill a vacancy before the vacancy actually occurs, the selection of the convention becoming effective upon the actual date of the vacancy. House Committee on Elections, Minutes, January 23, 1990, attachment II; House Committee on Elections, Minutes, March 23, 1989, attachment II; Senate Committee on Elections, Minutes, February 27, 1989, attachment 4; Senate Committee on Elections, Minutes, January 23, 1989, attachment 3. The statute does not affect the time limitations set forth in K.S.A. 1990 Supp. 25-3902.

II. May an individual simultaneously serve as a state representative and as a member of the board of commissioners of a city of the first class?

The second issue you ask us to address regards whether an individual may simultaneously serve as a state representative and as a member of the board of commissioners of a city of the first class. Specifically, you ask whether an individual serving in both capacities would constitute a conflict of interest.

Pursuant to K.S.A. 46-254 and K.S.A. 1990 Supp. 75-4303a, as amended by L. 1991, ch. 150, § 42, the Kansas commission on governmental standards and conduct is authorized to issue written opinions regarding interpretation of governmental ethics laws. Those laws are contained in K.S.A. 46-215 et seq and K.S.A. 75-4301 et seq. Any person who acts in accordance with the provisions of such an opinion is presumed to have complied with the provisions of the acts regarding governmental ethics. See K.S.A. 46-254, K.S.A. 1990 Supp.

75-4303a, as amended. Therefore, we must defer to the Kansas commission on governmental standards and conduct in determining whether simultaneous service as a state representative and a member of the board of commissioners of a city of the first class constitutes a violation of governmental ethics. However, we will determine whether any remaining statute or common law doctrine would preclude such service.

K.S.A. 13-1802 states:

"No member of the board of commissioners [of a city of the first class], or the mayor, shall hold any office of profit or trust under the laws of any state or the United States, or hold any county or other city office; nor shall the mayor or any commissioner ever be elected or appointed to any office created by, or the compensation of which was increased or fixed by, the board of commissioners, while he or she was a member thereof, until after the expiration of at least two years after he or she has ceased to be a member of said board."

The statute prohibits the mayor and members of the board of commissioners of a city of the first class from holding other public offices or positions while serving as a member of the board of commissioners. Fransham v. McDowell, 202 Kan. 604, 608 (1969). As the office of state representative constitutes an office of profit, Attorney General Opinion No. 80-134, a member of the board of commissioners of a city of the first class is precluded from simultaneously serving as a state representative.

III. May an individual simultaneously serve as a state representative and as president of a registered lobbying group?

As previously stated, the Kansas commission on governmental standards and conduct is authorized to issue written opinions regarding interpretation of governmental ethics law. We limit our review to common law doctrine and those statutes beyond K.S.A. 46-215 et seq. and K.S.A. 75-4301 et seq.

A review of statutes not comprising governmental ethics laws indicates no statutory prohibition against an individual serving as both state representative and president of a

registered lobbying group. Therefore, a determination of whether an individual may simultaneously serve in both capacities will be based on the applicability of the common law doctrine of incompatibility of offices.

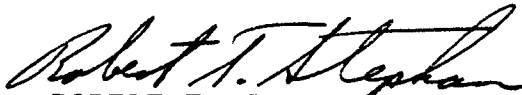
The common law doctrine of incompatibility of offices precludes an individual from simultaneously serving in two offices when the nature and duties of the two offices are incompatible. In applying the doctrine, courts have traditionally held that a person is barred from holding two incompatible public offices. Attorney General Opinion No. 86-41.

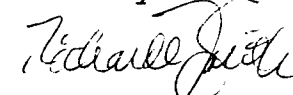
"What is a 'public office' and who is a 'public officer'? While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.'" Sowers v. Wells, 150 Kan. 630, 633 (1939).

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. Attorney General Opinion No. 86-41. While the president of a registered lobbying group may attempt to influence the manner in which sovereign power is exercised, the president of a registered lobbying group does not possess the authority to exercise sovereign power. The position of president of a registered lobbying group does not constitute a public office. The common law doctrine of incompatibility of offices, being inapplicable to the situation you present, does not preclude an individual from simultaneously serving as state representative and as president of a registered lobbying group. However, the ability of an individual to

simultaneously serve in both roles is subject to the findings of the Kansas commission on governmental standards and conduct.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


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