



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 92- 31

The Honorable Tim Shallenburger  
State Representative, First District  
State Capitol, Room 174-W  
Topeka, Kansas 66612

Re: State Institutions and Agencies; Historical  
Property--State Educational Institutions;  
Management and Operation--Appointment of Employees;  
Teaching Personnel; Concurrent Service as Member of  
the Legislature

Synopsis: An individual who is employed as an instructor at a  
state educational institution is not precluded by  
constitutional or statutory provision from  
concurrently serving as a member of the  
legislature. Cited herein: K.S.A. 1991 Supp.  
75-2935; 76-712; K.S.A. 76-714; 76-715; Kan.  
Const., art. 6, § 3.

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Dear Representative Shallenburger:

As representative for the first district, you request our  
opinion regarding whether an individual employed as an  
instructor at a state educational institution may serve as a  
member of the legislature. Your question is raised by a  
recent decision of the Nebraska Supreme Court.

In State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb.  
1991), the supreme court of Nebraska determined that an  
individual was not permitted to hold a position of assistant  
professor at a state college while concurrently serving as a

member of the state's unicameral legislature. The decision of the court is based on interpretation of section 1 of article II of the constitution of the state of Nebraska. That provision provides that "[t]he powers of the government of [Nebraska] are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Neb. Const., art. II, § 1. (Emphasis added.) The provision as interpreted by the court serves two functions. In its institutional aspect, section 1 of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. Conway, 472 N.W.2d at 408. In its personnel or individual aspect, section 1 of article II serves as a check against the concentration of power and guards against conflicts of interest by prohibiting certain persons from serving concurrently two branches of government. Id. Such restriction applies to employees as well as officers of a branch of government. Id. at 412. Because the board of trustees of the Nebraska state colleges is part of the executive branch, those individuals who work for state colleges likewise are members of the executive branch. Id. at 415. Therefore, an individual who is employed as an assistant professor at a state college is prohibited by section 1 of article II of the Nebraska constitution from concurrently serving as a member of the state's unicameral legislature.

Unlike the constitution of the state of Nebraska, the constitution of the state of Kansas does not expressly provide for a separation of powers. State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 59 (1984). The government of the state is divided into three departments, each of which is given the powers and functions appropriate to it. Id. Because of the establishment of the three branches of government, the courts have assumed the applicability of the doctrine of separation of powers among the three branches of government -- legislative, executive and judicial. Leek v. Theis, 267 Kan. 784, 804 (1975). The very structure of the three-branch system of government gives rise to the doctrine. State ex rel. Stephan, 236 Kan. at 59. The separation of powers doctrine is designed to avoid a dangerous concentration of power and to allow respective powers to be assigned to the department best fitted to exercise them. Leek, 217 Kan. at 805. While the Kansas constitution establishes three branches of government, it was never

intended that an entire and complete separation be maintained. See In re Sims, 54 Kan. 1 (1894). The rigid separation of powers moulded into the Nebraska constitution is not part of the Kansas constitution. See Leek, 217 at 799. It is only where the whole power of one department is exercised by the same hands which possess the whole power of another department that the fundamental principles of a free constitution are subverted. Van Sickle v. Shanahan, 212 Kan. 426, 451 (1973). Taking into consideration the functions and duties of an instructor at a state educational institution and of a member of the legislature, it is determined that such a concentration of powers does not occur when the instructor concurrently serves as a member of the legislature. The constitution of the state of Kansas does not prohibit an individual who is employed as an instructor at a state educational institution from concurrently serving as a member of the legislature.

As teaching and research personnel in the state educational institutions are in the unclassified service of the state, K.S.A. 1991 Supp. 74-2935, there is no statutory prohibition against an individual concurrently serving as an instructor at a state educational institution and as a member of the legislature. Therefore, it must be determined whether the common law doctrine of incompatibility of offices would preclude such service.

In applying the doctrine of incompatibility of offices, the courts have traditionally held that this principle does not apply unless the person holds two incompatible public offices.

"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. . . ." 63A Am.Jur.2d Public Officers and Employees § 69 (1984).

While the Kansas Supreme Court has generally adhered to this rule, the court in Dyche v. Davis, 92 Kan. 971 (1914), applied the doctrine to a situation where a public officer also held a position of public employment and the compensation for the public office and public employment were both payable from public funds. Id. at 977. A member of the legislature is a public officer; however, it is not disputed that an

instructor at a state educational institution is not a public officer. Id. Therefore, if the instructor is not paid from public funds, the doctrine of incompatibility of offices is inapplicable to the situation in which an instructor concurrently serves as a member of the legislature. However, the ability of an individual to concurrently serve as instructor and member of the legislature is subject to the doctrine if the individual receives compensation for both positions from public funds.

"The compatibility which will operate to vacate the first office must be something more than the mere physical impossibility of the performance of the duties of the two offices by one person, and may be said to arise where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."  
Abry v. Gray, 58 Kan. 148, 149 (1897).

"Offices are incompatible when the performance of the duties of one, in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices."  
Dyche, 92 Kan. at 977.

In reading Abry and Dyche together, it is apparent that the Kansas Supreme Court has determined that incompatibility of offices requires more than a physical impossibility to discharge the duties of both offices at the same time. There must be an inconsistency in the functions of the two offices to the extent that a performance of the duties of one office in some way interferes with the performance of the duties of the other, thus making it improper from a public policy standpoint for one person to retain both offices.

General authorities also provide guidance on the types of interference which give rise to incompatibility. Incompatibility is to be found in the character of the offices and their relation to each other. 63A Am.Jur.2d Public Officers and Employees § 78 (1984). Two offices or positions are incompatible if there are many potential conflicts of


interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. Id. Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second. Id.


The board of regents is authorized to make contracts and adopt orders, policies, or rules and regulations for the control, operation, management and supervision of the state educational institutions. K.S.A. 1991 Supp. 76-712. The members of the board of regents are appointed by the governor, subject to confirmation by the senate. Kan. Const., art. 6, sec. 3. The board appoints the chief executive officers of the state educational institutions and prescribes the compensation payable to each chief executive officer. K.S.A. 76-714. Pursuant to authorization by the board of regents, the chief executive officer of each state educational institution may appoint employees. K.S.A. 76-715. Employees in the unclassified service serve at the pleasure of the chief executive officer, subject to policies approved by the board of regents. Id. Such employees receive such compensation as is prescribed by the chief executive officer within authorizations by the board of regents. Id.

It is clear that a conflict sufficient to find incompatibility does not exist when an individual who is employed as an instructor at a state educational institution concurrently serves as a member of the legislature. A member of the legislature does not have the responsibility of evaluating the performance of the instructor, nor may a member of the legislature dismiss an instructor from employment. While a member of the legislature may introduce legislation which ultimately could affect the instructor's duties or compensation, the member is only one of 125 votes, and the remoteness of the influence is far short of the type of continuing conflict necessary for an incompatibility to occur. See Attorney General Opinions No. 84-59; 80-134. An individual who is employed as an instructor at a state educational institution is not precluded by constitutional or

statutory provision from concurrently serving as a member of the legislature.

Very truly yours,

  
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