



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 3, 1992

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 92- 139

Harold T. Walker
Kansas City City Attorney
Ninth Floor, Municipal Office Building
701 North Seventh Street
Kansas City, Kansas 66101

Re: Cities of the First Class; Government by Mayor and Council and General Laws--Public Utilities; Board of Public Utilities--Incompatibility of Offices; Assistant City Treasurer Serving as Member of Board of Public Utilities

Synopsis: Based upon the facts presented, the doctrine of incompatibility of offices precludes a person from serving concurrently as assistant city treasurer for the city of Kansas City and as a member of the board of public utilities for Kansas City. Cited herein: K.S.A. 13-1220.

* * *

Dear Mr. Walker:

As city attorney for the city of Kansas City, you ask our opinion whether the position of assistant city treasurer is incompatible with membership on the board of public utilities.

Although K.S.A. 13-1220 allows Kansas City to establish a board of public utilities, Kansas City has opted out of the statutory board by charter ordinance and has created and defined its own board of public utilities. Kansas City Charter Ordinance No. 106, section 3, establishes a six person board with three members elected at-large and three members

elected by district. The board's duties are to "exclusively manage, operate, maintain and control the daily operation of the water plant and the electric-light plant of the city. . .

."

Section 16 provides:

"The city treasurer shall be ex officio treasurer of the board. Except as otherwise authorized, all funds and property in the treasurer's hands belonging to the water and light department shall be subject to the control of the boards, and it shall be the duty of the treasurer to receive and receipt for daily the money collected by the board, and to pay out the same when ordered by the governing body of the city or the board upon warrants signed by the mayor and administrator or president or vice-president of the board and countersigned by the general manager, certifying that such warrant is issued by authority of the governing body of the city or the board. The ex officio treasurer shall give a surety bond to the board in such amount as it may deem necessary, the bond to be approved and paid for by the board."

You inform us that the Kansas City personnel department job description for an assistant city treasurer includes the tasks of auditing pledges and withdrawal forms to cover operating accounts and investments for the city and Board of Public Utilities." The job description also says: "In the absence of the city treasurer the assistant city treasurer will assume responsibility for the treasurer's office." Thus the assistant city treasurer acts as the ex officio treasurer for the board in the city treasurer's absence.

The decisions of the Kansas Supreme Court do not permit an individual to hold more than one public office if there is an "incompatibility" between the offices. Dyche v. Davis, 92 Kan. 971 (1974); Congdon v. Knapp, 106 Kan. 206 (1920). The incompatibility doctrine applies in those cases where two public offices are held by the same individual at the same time. In Abry v. Gray, 58 Kan. 148 (1897), the Kansas Supreme

elected by district. The board's duties are to "exclusively manage, operate, maintain and control the daily operation of the water plant and the electric-light plant of the city. . .

."

Section 16 provides:

"The city treasurer shall be ex officio treasurer of the board. Except as otherwise authorized, all funds and property in the treasurer's hands belonging to the water and light department shall be subject to the control of the boards, and it shall be the duty of the treasurer to receive and receipt for daily the money collected by the board, and to pay out the same when ordered by the governing body of the city or the board upon warrants signed by the mayor and administrator or president or vice-president of the board and countersigned by the general manager, certifying that such warrant is issued by authority of the governing body of the city or the board. The ex officio treasurer shall give a surety bond to the board in such amount as it may deem necessary, the bond to be approved and paid for by the board."

You inform us that the Kansas City personnel department job description for an assistant city treasurer includes the tasks of auditing pledges and withdrawal forms to cover operating accounts and investments for the city and Board of Public Utilities." The job description also says: "In the absence of the city treasurer the assistant city treasurer will assume responsibility for the treasurer's office." Thus the assistant city treasurer acts as the ex officio treasurer for the board in the city treasurer's absence.

The decisions of the Kansas Supreme Court do not permit an individual to hold more than one public office if there is an "incompatibility" between the offices. Dyche v. Davis, 92 Kan. 971 (1974); Congdon v. Knapp, 106 Kan. 206 (1920). The incompatibility doctrine applies in those cases where two public offices are held by the same individual at the same time. In Abry v. Gray, 58 Kan. 148 (1897), the Kansas Supreme

Court adopted the essential language of 19 American and English Encyclopedia of Law, 562, as follows:

"The incompatibility 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 when 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." Id. at 149.

Subsequently in Dyche v. Davis, supra the court held:

"Offices are incompatible when the performance of the duties of one in someway interferes with the performance of the duties of the other . . . it is an inconsistency in the functions of the two offices." Id. at 977.

And, in Congdon v. Knapp, supra, the Court ruled that "if one person holds two offices, the performance of the duties of either of which does not in any way interfere with the duties of the other, he is entitled to the compensation for both." Id. at 207.

General authorities also provide practical guidance on the types of interference which gives rise to incompatibility. For example:

"A conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbents of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other, as to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts." 67 C.J.S. Officers § 27.

In a previous opinion this office said,

"When an office is designed to operate as a check upon another, the holding of two offices by a single person is generally forbidden, the duties of one being fundamentally incompatible with the other." Attorney General Opinion No. 75-446.

Because the assistant city treasurer potentially acts as treasurer for the board and his duties include auditing the board's expenditures, and acting as a check on expenditures, the duties are fundamentally incompatible.

You argue that the position of assistant city treasurer is not a public office and that the doctrine of incompatibility of office only applies to offices. While other states may limit the doctrine to offices, Kansas extends the doctrine to public employees. See Dyche v. Davis 92 Kan. 971, 977 (1914).

We believe that based on the facts presented to us, the position of assistant city treasurer for the city of Kansas City and the office of member of the Kansas City board of public utilities are incompatible and holding both is precluded by common law.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steve Phillips
Assistant Attorney General

RTS:JLM:SP:jm