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May 24, 2012

ATTORNEY GENERAL OPINION NO. 2012- 15

Herbert Schwartzkopf  
Trego County Board of Commissioners  
216 Main Street  
WaKeeney, KS 67672

Re: Counties and County Officers–Hospitals and Related Facilities–Hospital Board; Procedure to Elect or Appoint Members; Term; Vacancies; Compensation and Expenses of Board Members; Powers and Duties of the Board

Synopsis: The offices of county commissioner and county hospital trustee are incompatible. Therefore, the same person may not serve concurrently as both county commissioner and county hospital trustee. Cited herein: K.S.A. 19-205; 19-2609; 19-4605; 19-4607; 19-4609; K.S.A. 2011 Supp. 19-4610; K.S.A. 77-109; Kan. Const. Art. 2 § 18.

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Dear Mr. Schwartzkopf:

On behalf of the Board of Commissioners of Trego County, you ask for our opinion whether a county commissioner may also serve on the county hospital's board of trustees. In your letter, you state that the hospital in Trego County is county-owned, and the Trego County Commission appoints members to the hospital board. You further state that in the opinion of the Trego County Commission, at least one county commissioner should be permitted to serve concurrently as a hospital board trustee.

The county hospital board of trustees is charged with management and control of the hospital.<sup>1</sup> If the board is appointed by the county commissioners, such as in Trego

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<sup>1</sup> K.S.A. 19-4605(a).

County, the board shall submit an annual budget to the commissioners for approval.<sup>2</sup> The board controls expenditures by the hospital and is authorized to enter into contracts for insurance and the employment of hospital administrators; to obtain letters of credit; to establish and fund a pension fund for hospital employees; and to supervise and maintain the care and custody of all hospital property.<sup>3</sup>

In the case of Trego County, the board of county commissioners appoints and exercises control over the hospital trustees.<sup>4</sup> The commissioners also approve the hospital's annual budget;<sup>5</sup> determine the amount of compensation for trustees;<sup>6</sup> have the authority to seek removal of trustees from office through civil proceedings;<sup>7</sup> may extend or shorten the term of some or all trustees in certain circumstances;<sup>8</sup> and may modify by resolution the number of trustees.<sup>9</sup>

The answer to your question depends on whether the office of county hospital trustee<sup>10</sup> and the office of county commissioner are incompatible. The Kansas Constitution empowers the Legislature to provide for the election and appointment of all public officers not otherwise provided for in the Constitution.<sup>11</sup> In the absence of a statute authorizing a person to hold more than one public office, Kansas courts apply the common law doctrine of incompatibility of office.<sup>12</sup>

Incompatibility of office arises 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.”<sup>13</sup> “Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other.”<sup>14</sup> “[I]ncompatibility exists whenever the statutory functions and duties of the offices require the officer to choose one obligation over another.”<sup>15</sup> For example, two offices are incompatible where the incumbent of one office has the power of appointment to the other office, or the power to remove its incumbent.<sup>16</sup>

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<sup>2</sup> K.S.A. 19-4607(c). Hospital boards that are elected by qualified electors of the county shall submit annual budgets to the county clerk.

<sup>3</sup> K.S.A. 2011 Supp. 19-4610.

<sup>4</sup> Pursuant to K.S.A. 19-4605(c), a county hospital board of trustees may be elected or appointed by the county commission. Because the Trego County hospital trustees are appointed, our opinion is focused on the duties of a county commission vis-à-vis *appointed* county hospital trustees.

<sup>5</sup> K.S.A. 19-4607(c).

<sup>6</sup> K.S.A. 19-4609.

<sup>7</sup> K.S.A. 19-2609; 19-4605(i).

<sup>8</sup> K.S.A. 19-4605(f) and (g).

<sup>9</sup> K.S.A. 19-4605(f).

<sup>10</sup> County hospital trustees are county officers. See, e.g., *State ex rel. Murray v. Palmgren*, 231 Kan. 524 (1982); Attorney General Opinion Nos. 73-78; 77-144; 83-11.

<sup>11</sup> Kan. Const., Art. 2, § 18.

<sup>12</sup> K.S.A. 77-109; *Congdon v. Knapp*, 106 Kan. 206 (1920); *Dyche v. Davis*, 92 Kan. 971 (1914); *Abry v. Gray*, 58 Kan. 148 (1897).

<sup>13</sup> 58 Kan. at 149.

<sup>14</sup> 92 Kan. at 977.

<sup>15</sup> 63C Am. Jur. 2d Public Officers and Employees § 58 (footnotes omitted).

<sup>16</sup> *Id.* at § 59;

We note that no statute exists that authorizes a person to hold concurrently the office of county commissioner and the office of county hospital trustee.<sup>17</sup> Accordingly, we apply the common law doctrine of incompatibility of office to determine whether the concurrent holding of such offices is permissible.

This office has previously opined on an identical matter. In Attorney General Opinion No. 83-11, Attorney General Robert Stephan considered whether one person could simultaneously hold the offices of county hospital trustee and county commissioner. Attorney General Stephan concluded that the two offices are incompatible:

[W]e think it clear that the duties and functions of county commissioner and hospital trustee are inherently inconsistent and repugnant so as to render these offices incompatible as a matter of law. This conclusion is prompted primarily by the fact that the office of hospital trustee is subordinate to that of county commissioners . . . .

In our judgment, these statutorily established relationships between the board of county commissioners and the county hospital board of trustees make it impossible for a person serving simultaneously as a member of both boards to 'discharge faithfully, impartially and efficiently the duties of both offices.' Even if such person in this capacity as county commissioner were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the office of hospital trustee, such abstention deprives the constituency in his or her county commissioner district of a representative who is free to make independent judgments on such matters. It is our opinion that such constituency is entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters. Thus, the county commissioner's abstention from voting on matters pertaining to the county hospital would deprive his or her constituency of a representative who is free to make independent judgments on such matters.<sup>18</sup>

Later, in Attorney General Opinion No. 93-29, Attorney General Stephan opined that a person may not concurrently serve as a councilperson of a city of the second class and as a member of the city hospital board of trustees based upon the doctrine of incompatibility of office:

[T]he hospital board is required to file reports with the governing body of the city. Also, the governing body of the city has the authority to modify the size of the hospital board and to fill vacancies occurring on the board. We

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<sup>17</sup> *But see* K.S.A. 19-205, which states that "no person holding any state, county, township or city office shall be eligible to the office of county commissioner . . ." Your question does not pertain to eligibility to the office of county commissioner, but rather the eligibility of a current county commissioner to the office of county hospital trustee, and therefore this statute does not apply to your question. This office previously opined that a county hospital trustee must forfeit that office prior to holding the office of county commissioner. See Attorney General Opinion No. 83-11.

<sup>18</sup> Internal citations omitted.

acknowledge that the actual exercise of this authority may occur remotely. However, it is the existence, rather than the operation, of such power which makes two offices incompatible. It is our opinion that the offices of councilperson for a city of the second class and trustee for the city hospital are incompatible. The common law doctrine of incompatibility of offices precludes a person from concurrently serving in both offices.

Since the issuance of Attorney General Opinion Nos. 83-11 and 93-29, the Kansas Supreme Court has considered a similar question, namely, whether a teacher may also serve as a school board member. In *Unified School Dist. No. 501, Shawnee County, Kan. v. Baker*, the Supreme Court described why Baker's employment as a teacher was incompatible with her duties as a board member:

By assuming the role of teacher and Board member, Baker occupies one position that is subordinate to the other. As Board member she is the employer and as teacher, the employee. In her capacity as Board member she sits on a policy-making body that negotiates with the teachers' collective bargaining representative, who is also her representative as a teacher. This is a clear conflict of interest. Similarly, Baker is subject to discipline by the Board. She may, under certain circumstances, be fired by it. The principal who must evaluate Baker's performance as a teacher indirectly answers to Baker as a board member. As Baker discharges her Board duties, her actions, no matter how well-intentioned, will be colored by the conflict inherent in her two positions.<sup>19</sup>

There has been no intervening legislation or case law that would cause us to reach a different conclusion here than in Attorney General Opinion Nos. 83-11 and 93-29. Applying the same analysis as the authorities cited above, we note that the Trego Board of County Commissioners appoints county hospital trustees, sets their compensation, and may modify the number of trustees and/or initiate civil proceedings to remove trustees from office. To paraphrase *Baker*, in the case of a county commissioner serving concurrently as a county hospital trustee, such person's service to each board, no matter how well-intentioned, would be colored by the conflict inherent in the two offices.

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<sup>19</sup> 269 Kan. 239, 251 (2000).

Therefore, we opine that the offices of county commissioner and county hospital trustee are incompatible, and may not be held concurrently by the same person.

Sincerely,

Derek Schmidt  
Kansas Attorney General

Sarah Fertig  
Assistant Attorney General

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