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ATTORNEY GENERAL OPINION NO. 2016-12

Thomas H. Sullivan  
Phillips County Counselor  
773 3rd Street  
Phillipsburg, Kansas 67661

Re: Counties and County Officers—County Commissioners—Eligibility to Office of Commissioner; Incompatibility of Offices; Volunteer Emergency Medical Technician; Facility Coordinator for County Emergency Medical Services System

Public Health—Emergency Medical Services—Establishment, Operation and Maintenance of Emergency Medical Services; Powers of Governing Board of Municipality; Emergency Medical Technician; Incompatibility of Offices; County Commissioner

Synopsis: Whether the common law doctrine of incompatibility of offices precludes a person from concurrently serving in a position of public official and public employment is dependent on specific facts regarding the relationship of the two roles. Based on the facts presented, a person is precluded from concurrently serving as a county commissioner and either a volunteer emergency medical technician in the same county or facility coordinator for the county emergency medical services system. Cited herein: K.S.A. 19-205; K.S.A. 2015 Supp. 65-6112, as amended by L. 2016, ch. 35, § 3; K.S.A. 65-6113; 65-6116; K.S.A. 2015 Supp. 65-6119; 65-6120 as amended by L. 2016, ch. 35, § 4; 65-6121, as amended by L. 2016, ch. 35, § 5; 65-6123; K.S.A. 77-109.

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Dear Mr. Sullivan:

As Phillips County Counselor, you ask our opinion in determining whether the common law doctrine of incompatibility of offices precludes one person from concurrently serving as county commissioner and either a volunteer emergency medical technician in the

same county or facility coordinator for the county emergency medical services (EMS) system.

### Statutory Provisions

Before determining whether the common law doctrine of incompatibility of offices precludes serving in the dual positions, it must be determined whether such service is governed by state statute. “The legislature decides who may qualify for public office. . . . If the legislature has spoken, the statement supersedes common law, and the doctrine of incompatibility of office does not apply.”<sup>1</sup> K.S.A. 19-205 states:

Except as provided by K.S.A. 12-344, 12-345, [ ] 12-363 and 12-365, and amendments thereto, no person holding any state, county, township or city office shall be eligible to the office of county commissioner in any county in this state.

Nothing in this section shall prohibit the appointment of any county commissioner to any state board, committee, council, commission or similar body which is established pursuant to statutory authority, so long as any county commissioner so appointed is not entitled to receive any pay, compensation, subsistence, mileage or expenses for serving on such body other than that which is provided by law to be paid in accordance with the provisions of K.S.A. 75-3223, and amendments thereto.

The exceptions listed in the opening provision of K.S.A. 19-205 regard consolidation or unification of certain city and county offices, functions, services and operations that are not applicable to the situation you present. Likewise, the positions of volunteer emergency medical technician in a county and facility coordinator for a county EMS system are not appointments to any statutorily-created state board, committee, council, commission or similar body. Therefore, it must be determined whether a volunteer emergency medical technician in a county or a facility coordinator for a county EMS system is serving in a state, county, township or city office.

In Attorney General Opinion No. 2013-19, we stated:

The Kansas Supreme Court addressed the distinction between officers and other employees in *Durflinger v. Artiles*.<sup>2</sup> As summarized by Attorney General Opinion No. 99-11, *Durflinger* concluded that the essential characteristics of public office are: (1) a position created by statute or ordinance, (2) a fixed tenure, and (3) the power to exercise some portion of the sovereign function of government. In addition, *Durflinger* cited an earlier case holding that an officer has responsibility for results and the power of direction, supervision, and control.<sup>3</sup>

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<sup>1</sup> *Unified School District No. 501, Shawnee County v. Baker*, 269 Kan. 239, 243 (2000).

<sup>2</sup> 234 Kan. 484 (1983) (disapproved on other grounds by *Boulanger v. Pol*, 258 Kan 289, 298 (1995)).

<sup>3</sup> *Durflinger*, 234 Kan. at 502.

Attorney General Opinion No. 99-11 applied *Durflinger* to determine whether the Public Works Director for the City of Liberal was a city officer. The opinion noted that while an ordinance created the Public Works Department, no statute or ordinance specifically created the position of Public Works Director or dictated the position's duties and responsibilities. In addition, the Public Works Director reported to the City Manager (who is a city officer in a city with a commission-manager form of government) and worked under the City Manager's guidance and direction. For these reasons, the opinion concluded that the Public Works Director was not a city officer.<sup>4</sup>

You state that the county, utilizing its authority under K.S.A. 65-6113, has established and operates and maintains an emergency medical service or ambulance service. Under the statute:

[The county commission] may contract with any person, other municipality or board of a county hospital for the purpose of furnishing emergency medical services or ambulance services within or without the boundaries of the municipality upon such terms and conditions and for such compensation as may be agreed upon which shall be payable from the general fund of such municipality or from a special fund for which a tax is levied under the provisions of this act.<sup>5</sup>

Statutes within K.S.A. 65-6101 *et seq.*, which govern emergency medical services, recognize several categories of technicians, including mobile intensive care technicians,<sup>6</sup> emergency medical technicians-intermediate, advanced emergency medical technicians and emergency medical technicians-intermediate/defibrillator,<sup>7</sup> emergency medical technicians<sup>8</sup> and emergency medical technicians-defibrillator.<sup>9</sup> The statutes set out the medical activities that may be performed by each classification of technician. The statutes, however, do not establish a fixed term during which the services may be performed<sup>10</sup> or authorize the technicians to exercise some portion of the sovereign function of the county. There are no references in state statutes to a "facility coordinator" for a county EMS system. The technician positions and the facility coordinator position are not created by statute or ordinance, do not have a fixed tenure, or do not possess the power to exercise some portion of the sovereign function of the county. Therefore, neither the technician position nor the facility coordinator position constitutes an office within the meaning of K.S.A. 19-205.

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<sup>4</sup> Internal quotation marks omitted.

<sup>5</sup> K.S.A. 65-6113(a). See also K.S.A. 65-6116.

<sup>6</sup> K.S.A. 2015 Supp. 65-6119.

<sup>7</sup> K.S.A. 2015 Supp. 65-6120, as amended by L. 2016, ch. 35, § 4.

<sup>8</sup> K.S.A. 2015 Supp. 65-6121, as amended by L. 2016, ch. 35, § 5.

<sup>9</sup> K.S.A. 2015 Supp. 65-6123.

<sup>10</sup> The individual must be properly certified when performing the services. See K.S.A. 2015 Supp. 65-6112, as amended and 65-6119 through 65-6123.

We have been unable to locate any other statute that might prohibit a person from simultaneously holding the office of county commissioner and serving as either a volunteer emergency medical technician in the same county or facility coordinator for the county EMS system. Further, we have not located any statute that authorizes a county commissioner to simultaneously hold either the technician position or the facility coordinator position. Thus, in the absence of the Legislature having provided by statute either permission or prohibition on the simultaneous holding of the positions, we turn to the common law as the legal authority that governs this situation.<sup>11</sup>

### Common Law Prohibition

The common law doctrine of incompatibility of offices prohibits an individual from holding more than one public office at the same time when there is an incompatibility between the offices.<sup>12</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>13</sup> This is something more than a physical impossibility to discharge the duties of both offices at the same time.<sup>14</sup> It is an inconsistency in the functions of the two offices.<sup>15</sup> “A person holding both offices is confronted with the duty of faithfully, impartially and efficiently discharging the duties of these offices in the best interests of the respective constituencies,” a duty that may be impossible when the constituencies served by the public officer have competing interests.<sup>16</sup> The Kansas Supreme Court long has applied the doctrine “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>17</sup>

In *Dyche v. Davis*,<sup>18</sup> the Kansas Supreme Court determined the doctrine applies when a person concurrently holds a public *office* and another position of public *employment*.<sup>19</sup> “It is inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised.”<sup>20</sup> Other state courts applying the common law doctrine to circumstances in which an office holder attempts to serve simultaneously as an employee in the same unit of government have reached the same conclusion.<sup>21</sup> The doctrine applies irrespective of whether the person draws two

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<sup>11</sup> See K.S.A. 77-109; see also *Baker*, 269 Kan. at 252 (“The legislature holds the trump card to resolve the question before us today, either by specific authorization or prohibition. However, that card has not been played. Until it has . . . [w]e are obligated to apply the common-law doctrine of incompatibility of office in the absence of a specific legislative expression on dual office-holding.”).

<sup>12</sup> *Baker*, 269 Kan. at 249.

<sup>13</sup> *Dyche v. Davis*, 92 Kan. 971, 977 (1914).

<sup>14</sup> *Baker*, 269 Kan. at 248.

<sup>15</sup> *Id.*

<sup>16</sup> Attorney General Opinion No. 2014-03.

<sup>17</sup> *Baker*, 269 Kan. at 248, quoting *Abry v. Gray*, 58 Kan. 148, 149 (1897).

<sup>18</sup> 92 Kan. 971 (1914).

<sup>19</sup> *Baker*, 269 Kan. at 248-49.

<sup>20</sup> *Baker*, 269 Kan. at 239, Syl. ¶ 6.

<sup>21</sup> See, e.g., *Township of Belleville v. Fornarotto*, 228 N.J. Super. 412 (1988) (elected office of township commissioner is incompatible with simultaneous position of housing inspector); *Rogers v. Village of Tinley Park*, 116 Ill.App.3d 437 (1983) (elected office of village trustee incompatible with employment as village police officer); *Kaufman v. Pannuccio*, 121 N.J. Super. 27 (1972) (office of city council member incompatible with employment as city police officer); *Otradovec v. City of Green Bay*, 118 Wis.2d 393

salaries.<sup>22</sup> Abstaining from participating as a public official in actions that potentially would affect the person's role as public employee is not a legally satisfactory resolution.<sup>23</sup>

In your letter requesting assistance, you explain the organizational structure of the county EMS system. The following points are taken from that explanation:

- The county EMS system is largely a volunteer organization, but has a full-time EMS director and full-time office staff.
- The county commission hires the EMS director.<sup>24</sup>
- The EMS director has the authority and responsibility to hire and fire employees of the EMS system without the approval or prior authorization of the county commission.
- The EMS director must also make professional judgments about which emergency medical technicians are qualified to be on call.
- All volunteers are certified emergency medical technicians and work under the supervision of the EMS director.
- Ambulances owned by the county are stationed in either a county-owned building that is manned by a part time "facility coordinator" or in local municipal facilities that are manned by "community coordinators."
- The facility coordinator and the community coordinators are employed and supervised solely by the EMS director.
- The facility coordinator is responsible for maintaining the county-owned building, which includes training facilities and administrative offices, and the ambulances stationed therein, and is responsible for scheduling the emergency medical technicians who will be on call in the Logan area.
- The county commission does not directly supervise any of the EMS personnel.

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(1984) (office of alderman on city common council incompatible with employment as residential appraiser in city assessor's office). We have previously reached the same conclusion in opining on an analogous circumstance. See Attorney General Opinion No. 2012-15 (position of county commissioner incompatible with trustee for county hospital).

<sup>22</sup> *Baker*, 269 Kan. at 239, Syl. ¶ 5. We note, however, that in your letter requesting our opinion you state that a volunteer EMT in Phillips County is in fact paid a stipend whenever called out on an ambulance run and that a facility coordinator receives a monthly payment from the county.

<sup>23</sup> See *Baker*, 269 Kan. at 251.

<sup>24</sup> You do not so state in your letter, but we assume the county commission also has authority to terminate the employment of the EMS director.

The Kansas Supreme Court in *Unified School District No. 501, Shawnee County v. Baker*<sup>25</sup> reviewed whether the common law doctrine of incompatibility of offices precludes one person from concurrently serving as a school board member and a teacher in the same school district.

As we focus on the agreed facts before us, the inescapable conclusion is that Baker's positions are incompatible. 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>26</sup>

K.S.A. 65-6113(a) authorizes a county to "establish, operate and maintain an emergency medical service or ambulance service" and to "contract with any person, other municipality or board of a county hospital for the purpose of furnishing emergency medical services or ambulance services within or without the boundaries of the municipality upon such terms and conditions and for such compensation as may be agreed upon." However, we have not located any statutes that address the supervisory roles of persons participating in a county EMS system. Given the lack of a statutory organizational system, we assume that the organizational system utilized in the scenario you present is established by county resolution or policy or through agreement by the county commission and persons participating in the county EMS system.

Without a statutory organizational system, the supervisory role of the EMS director could be modified by the county commission to meet any new concerns or desires of the county commission. In addition, the costs of operating the EMS system are payable from the county's general fund or from a special fund for which a tax is levied by county commission action.<sup>27</sup> If the costs prove to be too high for the county commission's comfort, the county commission may seek to rein in costs by directing the EMS director to lower payments to the volunteer emergency medical technicians or the facility coordinator; similarly, the county commission holds authority to raise and expend more public money to increase payments to the volunteer emergency medical technicians or the facility coordinator. If the county commission has concerns regarding the actions or performance of a volunteer emergency medical technician or the facility coordinator, it may direct the EMS director to omit the person from further assignments. Even though the EMS director currently possesses extensive authority in operating and maintaining the county EMS system, the EMS director remains answerable to the county

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<sup>25</sup> 269 Kan. 239 (2000).

<sup>26</sup> *Baker*, 269 Kan. at 251 (emphasis added).

<sup>27</sup> See K.S.A. 65-6113.

commission, which includes a person whom the EMS director supervises. Given these and similar factors, we determine the common law doctrine of incompatibility of offices precludes one person from concurrently serving as a county commissioner and either a volunteer emergency medical technician in the same county or facility coordinator for the county EMS system.

#### Remedy to the Incompatibility

Having found the offices incompatible, we turn to your final question that asks, “[W]hich office should be forfeited?” As a general matter, courts applying the common-law doctrine of incompatibility of office have held that a person’s acceptance of the later-in-time office operates to vacate the office previously held.<sup>28</sup> Strictly applying that general rule to the facts as you have presented them would result in the conclusion that the positions of both volunteer emergency medical technician and facility coordinator for the county EMS system already have been forfeited upon the assumption by the same individual of the office of county commissioner. However, we note that in circumstances, such as presented here, in which the first-held of the incompatible offices is a position of employment other than a public office, courts have sometimes exercised their equitable authority to require that a choice be made between the two offices rather than holding that the first-held position of employment is forfeited as a matter of law.<sup>29</sup> The Kansas Supreme Court has followed that equitable approach.<sup>30</sup> Thus, we think Kansas courts would find the incompatibility cured either by resignation as county commissioner or by resignation as both volunteer emergency medical technician and as facility coordinator.

Sincerely,

Derek Schmidt  
Attorney General

Richard D. Smith  
Assistant Attorney General

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<sup>28</sup> See *Baker*, 269 Kan. at 252 (citing *Gilbert*, 67 Kan. at 362-63 (1903)).

<sup>29</sup> See, e.g., *City of Wildwood v. DeMarzo*, 412 N.J. Super. 105,124 (permitting dual office-holder to elect which office he or she wishes to retain); *Otradovec*, 118 Wis.2d at 3395,397 (same).

<sup>30</sup> *Baker*, 269 Kan. at 252 (disqualifying district employee from serving on school board, rather than as teacher, to avoid “inequitable” result).