



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

August 25, 2016

ATTORNEY GENERAL OPINION NO. 2016-13

Craig S. Crosswhite
Ness County Attorney
118-1/2 Penn
P.O. Box 266
Ness City, KS 67560

Re: Counties and County Officers—County Commissioners—Eligibility to Office of Commissioner; Incompatibility of Offices; Economic Development Director

Synopsis: The common law doctrine of incompatibility of offices precludes a person from concurrently serving as a County Commissioner for Ness County and the Ness County economic development director. Cited herein: K.S.A. 19-101; 19-205; 19-4101.

* * *

Dear Mr. Crosswhite:

As Ness County Attorney, you ask our opinion on whether a person may concurrently serve as a Ness County Commissioner and an economic development director who is employed and supervised by the Board of County Commissioners.

In Attorney General Opinion No. 2016-12, we reviewed whether K.S.A. 19-205 or the common law doctrine of incompatibility of offices precludes a 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 emergency medical services system. The analysis set forth in that opinion is applicable in determining whether a person may concurrently serve as a county commissioner and an economic development director who is employed and supervised by the board of county commissioners.

Statutory Provisions

“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.”¹ 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.

As noted in Attorney General Opinion No. 2016-12, 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. Ness County is not attempting to consolidate or unify any of its offices, functions, services and operations with those of a city. Likewise, the position of economic development director for Ness County is not a statutorily-created state board, committee, council, commission or similar body. Since the exceptions set forth in K.S.A. 19-205 are not applicable, it must be determined whether the position of Ness County economic development director is a state, county, township or city office.

[T]he 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, . . . an officer has responsibility for results and the power of direction, supervision, and control.²

A county is authorized to “establish and conduct a program for its future economic growth and development in accordance with the provisions of [K.S.A. 19-4101 *et seq.*].”³ Further, the courts seem to recognize that county home rule⁴ provides authority for pursuing economic development.⁵ Regardless of the source of the authority, we can find no references in the statutes to an economic development director. The position is not one created by statute, nor does it appear to be one created by county resolution.

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

² Attorney General Opinion No. 2016-12, quoting Attorney General Opinion No. 2013-19.

³ K.S.A. 19-4101.

⁴ K.S.A. 19-101 *et seq.*

⁵ See *General Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm’rs*, 275 Kan. 525 (2003).

There is no fixed tenure for the position. The duties of the Ness County economic development director are established by the Board of County Commissioners for Ness County. Any actions taken by the economic development director are subject to the commission's review. The economic development director is not performing a sovereign function of government. The position of economic development director for Ness County does not constitute a state, county, township or city office under K.S.A. 19-205.

We have not located any other statutes that address whether a person is authorized to or prohibited from concurrently serving as a county commissioner and an economic development director who is employed and supervised by the board of county commissioners. 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.⁶

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.⁷ "Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other."⁸ This is something more than a physical impossibility to discharge the duties of both offices at the same time.⁹ It is an inconsistency in the functions of the two offices.¹⁰ The Kansas Supreme Court has determined the doctrine applies when a person concurrently holds a public office and a position of public employment.¹¹ "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."¹²

The economic development director for Ness County was hired by the Board of County Commissioners of Ness County and is directly answerable to the Board.¹³ The director's continued employment is determined by the Board.¹⁴ The budget for the position is subject to annual review and approval by the Board.¹⁵ The economic development director is subject to the same personnel policy manual as other employees of the County.¹⁶ A person who concurrently serves as a County

⁶ 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.").

⁷ *Baker*, 269 Kan. at 249.

⁸ *Dyche v. Davis*, 92 Kan. 971, 977 (1914).

⁹ *Baker*, 269 Kan. at 248.

¹⁰ *Id.*

¹¹ *Baker*, 269 Kan. at 248-49.

¹² *Baker*, 269 Kan. at 239, Syl. ¶ 6.

¹³ Correspondence, Craig S. Crosswhite, May 26, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

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Commissioner for Ness County and the Ness County economic development director is both the employer and the employee or the supervisor and the supervised. The common law doctrine of incompatibility of offices precludes a person from concurrently serving as a County Commissioner for Ness County and the Ness County economic development director.

Sincerely,

Derek Schmidt
Attorney General

Richard D. Smith
Assistant Attorney General

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