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October 23, 1979

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ATTORNEY GENERAL OPINION NO. 79- 242

The Honorable John H. Vogel
State Representative, 43rd District
Route 4, Box 213
Lawrence, Kansas 66044

Re: Roads and Bridges--County and Township Roads--
Appointment of Township Road Overseer's Assistant

Synopsis: The common law doctrine of incompatibility of offices does not preclude the employment of a member of the township board as the township road overseer's assistant, and the compensation of such assistant shall be determined by the township board within pertinent budgetary constraints.

* * *

Dear Representative Vogel:

In your request for an opinion of this office, you have asked whether a member of the township board may be appointed as an assistant to the township road overseer and be compensated for his services.

Your question requires consideration of the legal compatibility of these positions. Our review of pertinent statutes discloses no statutory prohibition applicable to the situation you have presented. Similarly, we are aware of no Kansas judicial decision which would specifically preclude appointment of a township board member as the overseer's assistant. However, the question arises as to whether the common law doctrine of incompatibility of offices would preclude a person from holding both positions simultaneously.

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In Dyche v. Davis, 92 Kan. 971 (1914), the Kansas Supreme Court defines this doctrine as follows:

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

It is important to note, and pertinent to your inquiry, that this common law principle is, for the most part, limited to situations involving the simultaneous holding of two public offices, as opposed to public positions. The general rule is stated thusly:

"The prohibition against one person holding more than one office at the same time is referenced to offices as distinguished from positions in 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." (Emphasis added.) 63 Am.Jur.2d Public Officers and Employees §64, pp.669,670.

Although some jurisdictions have now enlarged this doctrine to include both public offices and public employment without restriction (see 70 A.L.R. 3rd 1188), the majority of states follow the traditional rule. (See 63 Am.Jur.2d Public Officers and Employees §64, pp.669,670.) While the Kansas Supreme Court has for the most part adhered to the majority rule, in Dyche v. Davis, supra, the Court 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 employment were both payable from public funds. 92 Kan. at 977. Such is the situation described in your inquiry, and based on the decision in Dyche, we believe it necessary to consider your inquiry in light of this common law principle.

In addition to Dyche, the other principal case concerning the incompatibility of offices is Abry v. Gray, 58 Kan. 148 (1897), where the Court adopted the essential language of 19 American and English Encyclopedia of Law, 562, as follows:

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"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 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." Id. at 149.

Thus, in reading Dyche and Abry 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. This rule is in accord with general authorities. In 89 A.L.R. 2d 632, it is stated:

"It is to be found in the character of the offices and their relation to each other, in subordination of the one to the other, and in the nature of the duties and functions which attach to them, and exist where the performance of the duties of the one interferes with the performance of the duties of the other. The offices are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both." (citations omitted.) Id. at 633.

Further, general authorities provide assistance in determining when the nature and duties of two offices are inconsistent, so as to render them incompatible. For example:

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"[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 incumbent 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 or 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 applying the foregoing principles to your inquiry, it is our judgment that the office of township board member is not incompatible with the position of assistant to the township road overseer. We do not find an inconsistency in the functions of these two positions to the extent that a performance of the duties of one interferes with the performance of the duties of the other. Nor do we find any public policy considerations that would render the simultaneous holding of these positions improper. To the contrary, the statutory provisions relating to the construction and maintenance of township roads express a public policy that sanctions employment of township officers for such purposes.

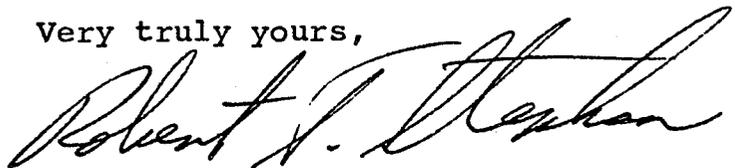
For example, K.S.A. 1978 Supp. 68-530 provides that in certain townships the township board may unanimously appoint the township trustee to act as road overseer or patrolman, and it further provides that the officers of any such township are "authorized to perform repair, maintenance and improvement work on township roads not to exceed a total cost to such township of one thousand dollars (\$1,000) per annum." In addition, K.S.A. 68-531 provides for fixing the compensation of the road overseer where the township trustee has been appointed to such position pursuant to 68-530. While these statutory provisions do not apply specifically to the township in question, we believe they are pertinent to your inquiry from the standpoint of expressing public policy. Certainly, they reflect legislative recognition that in certain instances it may be necessary and appropriate to employ township board members to effect the construction, repair or maintenance of township roads.

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As to your question regarding compensation of the road overseer's assistant, you have recognized in your letter that the appointment of a road overseer's assistant requires a determination by the county engineer that conditions warrant such appointment, and that it must be made with the approval of the township board. See K.S.A. 1978 Supp. 68-530. The compensation of any such assistant "shall be fixed by the township board at such rate as may be reasonable for the time actually employed in the performance of" his or her duties. K.S.A. 68-531. Thus, the amount and rate of such compensation is within the sound discretion of the township board, subject to such budgetary constraints as may be applicable. In our judgment, the monetary limitation set forth in the last proviso of K.S.A. 1978 Supp. 68-530, to which you have called our attention, applies only to the townships described in the immediately preceding proviso in that statute, and does not include the township about which you inquire.

In summary, it is our opinion that the doctrine of incompatibility of offices does not preclude the employment of a member of the township board as the township road overseer's assistant, and the compensation of such assistant shall be determined by the township board within pertinent budgetary constraints.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk