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November 8, 1979

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ATTORNEY GENERAL OPINION NO. 79- 255

The Honorable Jack H. Brier
Secretary of State
2nd Floor, State Capitol
Topeka, Kansas 66612

Re: Counties and County Officers--County Commissioners--
Eligibility to Hold Other Offices

Synopsis: The common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of county commissioner and member of a board of education of a unified school district.

* * *

Dear Secretary Brier:

You have requested our opinion "as to whether or not one person may hold the office of county commissioner and also serve on a school board, and whether or not these two offices are incompatible."

In framing your request, you cited us to the prohibitions of K.S.A. 19-205, which (as amended by L. 1979, ch. 68, §1) reads in pertinent part as follows:

"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."

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A similar question regarding the scope of this statute was discussed in Attorney General Opinion No. 76-127, where it was concluded that the prohibition of 19-205 does not extend to school district offices. We agree with that conclusion, which is in consonance with the principle announced in State v. Fleming, 61 Kan. 90 (1899), that high school trustees are not county officers.

Thus, absent any statutory statement as to the compatibility of these two offices, resolution of your inquiry depends upon application of the common law doctrine of incompatibility of offices. That doctrine has been defined, discussed and applied in several recently issued opinions of this office (Attorney General Opinion Nos. 79-242, 79-248 and 79-251), and in order to avoid unduly burdening this opinion by a restatement of the principles announced in those prior opinions, we are enclosing copies thereof for your consideration. Suffice it to state, though, that all of these opinions concluded that the applicable Kansas cases, as well as pertinent general authorities, indicate that incompatibility of offices requires more than a physical impossibility to discharge the duties of both offices at the same time. Moreover, 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.

In addition to the enclosed opinions, there are two other prior opinions having relevance to your inquiry. The first is a letter opinion issued by Attorney General Harold R. Fatzer on November 15, 1954, to the Thomas County Attorney. In that opinion, Attorney General Fatzer expressed uncertainty as to whether the offices of school board member and county commissioner were legally compatible. That opinion indicated a "possibility of conflicting interests," and suggested it would be advisable "for one person not to hold both of these offices."

However, in the previously-cited opinion of Attorney General Schneider (Attorney General Opinion No. 76-127), it was determined in an extremely summary and conclusory fashion that there is "no legal incompatibility or inconsistency in the functions and responsibilities" of the offices of school board member and county commissioner. Unfortunately, such conclusion was unsupported by any legal authorities or explanatory rationale. Thus, we do not find that opinion to be of any assistance in considering your inquiry.

Instead, we call your attention to the enclosed copy of Attorney General Opinion No. 79-248. There, the legal compatibility of the offices of commissioner of a second class city and school board member were considered, and we concluded that the common law doctrine of incompatibility of offices precludes one person from concurrently holding both such offices. Because of the similarity of your inquiry to the question addressed by that opinion, we believe that the rationale and authorities employed in support of the conclusion reached in Opinion No. 79-248 are equally applicable here and compel the same conclusion.

Here, as in Opinion No. 79-248, we are concerned with an individual holding two elective offices with overlapping constituencies. In that prior opinion we cited numerous instances where such dual office holder would be required to make decisions where the interests of the respective constituencies therein will not be identical. Similar instances exist for the offices of county commissioner and school board member. For example, the matters of taxation and the issuance of general obligation bonds present situations where the interests of the respective constituencies may be in conflict. Both the county and the unified school district have the power to levy ad valorem taxes and to issue bonds backed by the obligation to levy taxes in support thereof. We submit that the exercise of such powers by one such governmental body will not necessarily be in the best interests of the other.

Similarly, the authority of a school district to acquire land and construct school buildings thereon raises the same conflict. A school board is authorized by K.S.A. 72-8212 to acquire real property, including acquisitions through the exercise of the power of eminent domain, and there are numerous statutory authorizations for the issuance of bonds to finance the construction of school buildings. Can it reasonably be argued that the exercise of the foregoing authority to acquire sites within the county's boundaries, and to construct school buildings thereon, will always be consonant with the county's interest in maintaining its tax base or in exercising its authority to regulate land use within the county through its planning and zoning powers? (See K.S.A. 19-2901 et seq.) We think not.

The conflict arising from such competing interests was addressed in Attorney General Opinion No. 79-28, where it was concluded that the question of whether a local board of education is subject to a county's land-use regulations must be answered by the "balancing of interests" test adopted in Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan. App.2d 102 (1978). That conclusion led to the opinion that

"the applicability of such regulations to a local board of education is a factual question, to be decided in the first instance by the county's board of zoning appeals. If this initial decision is arbitrary or unreasonable in balancing the respective interests of the school board and the county, such decision may be overturned on review by the district court."

Further, as was recognized in Opinion No. 79-248, the Interlocal Cooperation Act (K.S.A. 12-2901 *et seq.*) provides additional opportunity for conflict. Utilization of these statutory provisions by the particular county and school district "will require the incumbent of the two offices in question to participate in the negotiation of the contracts and agreements contemplated therein in a manner that will be in the best interests of both constituencies. A conflict will arise where the best interests of one constituency is not identical to the best interests of the other." Attorney General Opinion No. 79-248, p. 5.

In all the foregoing examples of interrelationship of the offices of county commissioner and school board member, the overriding factor to be considered is whether one person may faithfully, impartially and efficiently discharge the duties of both offices. 89 A.L.R. 2d 632, 633. Applying this standard persuades us to the conclusion that the respective duties and functions of those offices are inherently inconsistent and repugnant, to the extent that they are legally incompatible.

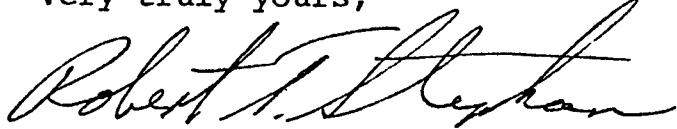
Moreover, we believe that considerations of public policy render it improper for a person to retain both such offices. As we stated in Opinion No. 79-248:

"Even if the incumbent of one office were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the other office, such abstention deprives one constituency or the other of a representative who is free to make independent judgments on such matters." Attorney General Opinion No. 79-248, pp. 6,7.

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It is our opinion that the common law doctrine of incompatibility of offices is a judicial statement of public policy which recognizes that the constituencies of both offices in question are entitled to an elected representative who can vote without conflict on substantially all matters. We do not believe that such policy can be fostered where one person holds simultaneously the offices of county commissioner and member of the board of education of a unified school district.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk

Enclosures: Attorney General Opinion No. 79-242
Attorney General Opinion No. 79-248
Attorney General Opinion No. 79-251