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February 16, 1981

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ATTORNEY GENERAL OPINION NO. 81- 45

Dennis W. Moore, District Attorney
Johnson County Courthouse
P.O. Box 728
6th Floor Tower
Olathe, Kansas 66061

Re: Counties and County Officers--Election Commissioners--
Simultaneous Holding of Office of Mayor of Second Class
City

Synopsis: There are no statutory obstacles to an election commissioner also holding the office of mayor of a city of the second class. Moreover, the common law doctrine of incompatibility of offices does not preclude such simultaneous incumbencies.

* * *

Dear Mr. Moore:

You have asked whether there are any legal problems regarding one person simultaneously holding the offices of election commissioner and mayor of a city of the second class. You indicate that the present Johnson County Election Commissioner has filed for election to the office of Mayor of the city of Roeland Park, and he has requested you to seek our opinion as to whether he may hold both offices, should he be elected mayor.

We have discovered no statutory provision bearing upon this proposition, nor have we found any judicial decisions which have addressed this particular question. Moreover, our records reflect that this question

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has not been considered in any prior opinion of this office, although we have noted the February 7, 1969, letter opinion of Attorney General Kent Frizzell in which he concluded that one person could simultaneously hold the office of mayor of Roeland Park and the position of programmer in the Johnson County election commissioner's office.

Therefore, absent any legal authorities dealing specifically with the question you have posed, resolution of your inquiry requires a determination of whether the offices of election commissioner and mayor of a second-class city are incompatible.

There are two principal Kansas cases concerning the incompatibility of offices. In Abry v. Gray, 58 Kan. 148 (1897), the Court adopted the essential language of 19 American and English Encyclopedia of Law, 562, as follows:

"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."

Subsequently, in Dyche v. Davis, 92 Kan. 971 (1914), the Court held:

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

Thus, in reading these cases 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

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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:

"[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, we have concluded that the common law doctrine of incompatibility of offices does not preclude one person from simultaneously holding the offices of election commissioner and mayor of a city of the second class. Certainly neither of such offices is vested with any supervisory power over the other, and a comparison of the powers, duties and functions of these two offices has provided no basis for concluding that they are inherently inconsistent and repugnant, to the extent that one person cannot faithfully and impartially discharge the duties of both offices.

The only instance where we have discerned the possibility of a conflict regards the duty of the election commissioner to conduct the city election at which he is a candidate for mayor. However, we must conclude as did Attorney General Frizzell in the opinion letter noted previously herein, that there is no more conflict present in this situation than there is for any of the 101 county clerks who are statutorily required to conduct elections in which they are candidates. Moreover, it should be recognized that this is not a situation in which the powers, duties and functions of the two offices are in conflict, thereby precluding the incumbent of both offices from acting in the best interests of the respective constituencies of these offices. Rather, it is a circumstance

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in which there are no powers, duties or functions of the mayor involved, and while it may be an instance that invites public scrutiny of the election commissioner's ability to faithfully and impartially discharge his statutory duties, it is not a situation that may be seized upon as compelling a finding that these offices are incompatible.

In summary, it is our opinion that there are no statutory obstacles to an election commissioner also holding the office of mayor of a city of the second class. Moreover, the common law doctrine of incompatibility of offices does not preclude such simultaneous incumbencies.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf