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May 11, 1981

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ATTORNEY GENERAL OPINION NO. 81-107

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Re: Cities of the Third Class -- Election, Appointment,
Removal of Officers -- Simultaneous Holding of
Elective and Appointive Offices

Synopsis: The common law doctrine of incompatibility of
offices precludes one person from simultaneously
holding the offices of city councilman and muni-
cipal judge in a city of the third class having
a mayor-council form of government. Cited herein:
K.S.A. 15-204, 15-209.

* * *

Dear Mr. McAnarney:

As city attorney for the city of Scranton, you have inquired whether the offices of city councilman and municipal judge in such city (a city of the third class having a mayor-council form of government) are incompatible, so as to preclude the simultaneous holding of both offices by one person.

Pursuant to K.S.A. 15-204, the municipal judge of such a city is an appointive officer thereof. That statute provides:

"The mayor, with the consent of the council, may appoint, at the first regular meeting of the governing body in May of each year, the following city officers, to wit: A municipal judge of the municipal court, a clerk, a treasurer, a marshal-chief of police, policemen, street commissioner, and such other officers as deemed necessary; and may retain a licensed professional engineer to act in the capacity of city engineer for specifically defined

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duties. The duties and pay of the various officers provided for in this section shall be regulated by ordinance. A majority of all the members of the council may remove any such officer; or, for good cause, the mayor may remove any such officer, with the consent of the council." (Emphasis added.)

The qualifications of elective and appointive officers of such cities are prescribed by K.S.A. 15-209, but neither this nor any other statute of which we are aware addresses the subject of your inquiry. Thus, resolution thereof requires application of the common law doctrine of incompatibility of offices.

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.

Also, in Congdon v. Knapp, 106 Kan. 206 (1920), the court ruled that "if one person holds two offices, the performance of the duties of either of which does not in any way interfere with the duties of the other, he is entitled to the compensation for both." Id. at 207.

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,

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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:

"[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.

Similarly, in 63 Am.Jur. 2d Public Officers and Employees §74, it is stated:

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties,

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and subject in some degree to the other's re-
visory power. Thus, two offices are incompat-
ible where the incumbent of the one has the
power of appointment to the other office or
the power to remove its incumbent, even though
the contingency on which the power may be ex-
ercised is remote." (Footnotes omitted.)

In Attorney General Opinion No. 81-74, the principles of law
expressed in the foregoing authorities were relied upon in
concluding that the offices of municipal judge and councilman
in a city of the second class having a mayor-council form of
government are incompatible. Even though the statutes govern-
ing these two classes of mayor-council cities differ somewhat,
we believe the rationale expressed in our prior opinion is
equally applicable here and that the same result should obtain.
Accordingly, we have enclosed a copy of Opinion No. 81-74 for
your consideration.

In addition to the considerations discussed in that prior
opinion, we also note the reasoning expressed in Attorney
General Opinion No. 79-248, in which we concluded that the
offices of city commissioner of a city of the second class
and board member of a unified school district are incompati-
ble. There, in noting that these offices served overlapping
constituencies, we stated:

"[T]he respective duties and functions of these
two offices are inherently inconsistent and
repugnant, to the extent that one person cannot
faithfully, impartially and efficiently dis-
charge the duties of both offices. Further-
more, we believe that considerations of public
policy render it improper for an incumbent to
retain both. Even if the incumbent of one
office were to abstain from discussing, par-
ticipating 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.
It is our opinion that the constituencies of
both offices are entitled, as a matter of
public policy, to an elected representative
who can vote without conflict on substantially
all matters." Id. at 6,7.

We believe the same public policy considerations noted above
are applicable here. The provisions of K.S.A. 15-204 quoted

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previously make it abundantly clear that the municipal judge serves at the pleasure of the city council, being subject to removal by the council or by the mayor, for good cause, "with the consent of the council." Additionally, this statute provides that the compensation of the municipal judge is to be fixed by ordinance. While it is arguable that a city councilman can avoid a conflict with the functions and duties of the office of municipal judge by abstaining from voting on the matters pertaining to the office of municipal judge, we believe the public policy considerations noted in Opinion No. 79-248 negate such argument. In our judgment, the city councilman's constituency is entitled, as a matter of public policy, to an elected representative who can vote without conflict on substantially all matters. Thus, the councilman's abstention from voting on matters concerning the office of municipal judge would deprive his or her constituency of a representative who is free to make independent judgments on such matters.

Moreover, from the standpoint of the office of municipal judge, we also believe it inappropriate, in light of these same public policy considerations, for the person holding such office to be adjudicating issues arising under ordinances adopted by a governing body of which such person is a member. In our judgment, such dual officeholding precludes the unfettered judgment that is necessary to the impartial execution of such person's judicial duties.

Therefore, it is our opinion that the common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of city councilman and municipal judge in a city of the third class having a mayor-council form of government. The respective duties and functions of these two offices are inherently inconsistent and repugnant to the extent that one person cannot faithfully, impartially and efficiently discharge the duties of both offices.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
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