



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

September 14, 1981

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-214

Mr. C. E. Russell  
Wellington City Attorney  
City Hall  
202 North Washington  
Wellington, Kansas 67152

Re: Cities and Municipalities -- Port Authorities --  
City Councilman as Port Authority Board Member

Synopsis: Because of the doctrine of incompatibility of offices, a council member of a city of the second class may not also hold the position of director on a city port authority board created pursuant to K.S.A. 1980 Supp. 12-3401 et seq. Cited herein: K.S.A. 1980 Supp. 12-3401, K.S.A. 12-3403, 14-101, 14-1060.

\*

\*

\*

Dear Mr. Russell:

You ask whether a councilman of a city of the second class may also serve as a member of the board of directors of a port authority created by said city pursuant to K.S.A. 12-3401 et seq. without violating the doctrine of incompatibility of offices.

The doctrine of incompatibility of offices was defined by the Kansas Supreme Court in Dyche v. Davis, 92 Kan. 971 (1914) as follows:

"Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices." Id. at 977.

63 Am.Jur.2d Public Officers and Employees, §74 provides the following test:

"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, and subject in some degree to the other's revisory power. Thus, two offices are incompatible where the incumbent of 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 exercised is remote."

To determine whether the office of council member in a city of the second class is incompatible with the office of port authority board member, we consider the functions of both offices. A council member in a city of the second class is a voting member of that city's governing body whose responsibilities require the member to act on behalf of the city. See, generally, K.S.A. 14-101 through 14-1060. A port authority board member is appointed pursuant to K.S.A. 12-3403(a), which states in pertinent part:

"A port authority created in accordance with this act shall be governed by a board of directors. Members of a board of directors of a port authority created by the exclusive action of a city shall consist of the number of members, not less than five (5), it deems necessary and be appointed by the governing body . . . . The appointing body may at any time remove a director appointed by it for misfeasance, nonfeasance, or malfeasance in office." (Emphasis added.)

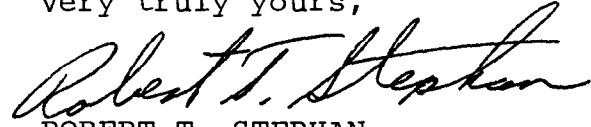
Thus, a city council member also holding the position of a director on the port authority board would be eligible to vote upon his or her appointment and likewise pass judgment on his or her removal. Having the power to appoint or remove oneself from one's office by virtue of holding a second office is clearly an element of incompatibility. This office has previously concluded that incompatibility cannot be resolved by having the person who holds two offices abstain from participating in matters affecting his other office. Attorney General Stephan stated in Attorney General Opinion No. 79-248:

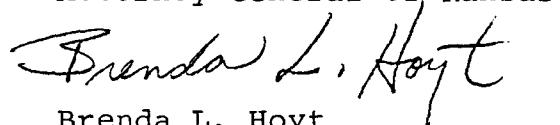
"Even if the incumbent of one office were to abstain from discussing, participating in or voting on matters affecting his or her incumbency of the other office, such abstention deprives one constituency or the other of a representative who is free to make independent judgments on such matters. It is 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."

It is unnecessary to cite further incompatible duties of these two offices.

Therefore, because of the doctrine of incompatibility of offices, a council member of a city of the second class may not also hold the position of director on a city port authority board created pursuant to K.S.A. 1980 Supp. 12-3401 et seq.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Brenda L. Hoyt  
Assistant Attorney General

RTS:BJS:BLH:hle