



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81- 249

Charles S. Gray  
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P. O. Box 176  
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Re: Cities of the Third Class -- Mayor-Commission Form  
of Government -- Mayor or Commissioner Serving as  
Fire Chief

Synopsis: The common-law doctrine of incompatibility of offices precludes one person from holding the office of fire chief while at the same time serving as mayor or city commissioner in a city of the third class having the mayor-commission form of government. The doctrine is applicable due to the statutory authority of the mayor and commissioners over the fire chief, in that the latter official is supervised by the mayor, pursuant to K.S.A. 15-1407, and is appointed (and, if necessary, removed) by the commission, pursuant to K.S.A. 15-1601 et seq. Cited herein: K.S.A. 15-301, 15-1402, 15-1407, 15-1502, 15-1601.

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Dear Mr. Gray:

As City Attorney for Altamont, Kansas, you request our opinion on a question concerning the simultaneous holding of two city offices by one person. Specifically, you ask whether it is proper for the fire chief to also serve as city commissioner or mayor. You inform us that the present mayor, prior to being elected in April of this year, had served as a city commissioner. At that time he was appointed fire chief, an office he still retains. Compensation is less than \$25.00 a month, and has not been increased since the present officeholder took the office.

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In the absence of a charter ordinance, cities of the third class in Kansas (of which Altamont is one) are allowed by statute to have two types of city government. The first, set out by K.S.A. 15-101 et seq., involves a mayor-council system whereby the mayor is elected from the city as a whole, presides at council meetings, and has "general supervision over the affairs of the city." K.S.A. 15-301. The second, found at K.S.A. 15-1201 et seq., and currently in use in Altamont, provides for a mayor-commission system whereby the duties of the mayor are less extensive than under the first system, as he is responsible only for certain city departments, including the fire department, (K.S.A. 15-1407), and serves in other respects as a co-equal member of the board of commissioners. K.S.A. 15-1502.

The distinction between these two systems is relevant to this inquiry, for the latter is governed by the provisions of K.S.A. 15-1402, which states that:

"Neither the mayor nor any commissioner shall be elected or appointed to any office created by, or the compensation of which was increased or fixed by, the board of commissioners while he or she was a member thereof, until the expiration of at least two years after such person has ceased to be a member of said board."

Under the facts as you present them, this statute would not seem to preclude the current dual-holding of offices, in that the office of fire chief was not created by the commission on which the current fire chief served as commissioner, nor has the salary been altered during the relevant period of time. However, in our opinion K.S.A. 15-1402 does not preclude the application of decisions of the Kansas Supreme Court which do not permit an individual to hold more than one public office if there is an "incompatibility" between the offices. Dyche v. Davis, 92 Kan. 971 (1914), Congdon v. Knapp, 106 Kan. 206 (1920).

The question of whether the offices at issue here are incompatible in a city such as Altamont has not been dealt with specifically by any Kansas case law. However, there are authorities which deal with the problem of incompatibility generally which can be applied here. In Abry v. Gray, 58 Kan. 148 (1897), the Kansas Supreme 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, supra, 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.

And, in Congdon v. Knapp, supra, 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.

General authorities also provide practical guidance on the types of interference which gives rise to incompatibility. 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 incumbents 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, as 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.

Applying the above principles to the offices involved here, it is our opinion that, as a fire chief is appointed by the board of commissioners and supervised by the mayor, the office is subject to such elected officials as to make the dual holding of both an appointive and an elective office incompatible. Members of the commission, in addition to having powers of appointment and removal over the fire chief, also may "make and enforce such rules and regulations as they deem fit" for the fire department (K.S.A. 15-1407), as well as fixing the term of office and salary for the position. K.S.A. 15-1601. Clearly, it cannot be said that the simultaneous holding of the office of fire chief would not "in any way interfere with the duties" of city commissioner. Congdon v. Knapp, supra. See also Attorney General Opinion No. 81-74.

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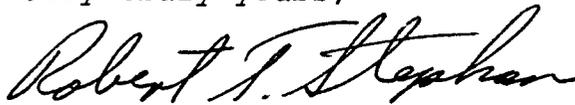
This would be even more the case if the mayor were to serve as fire chief, for in addition to the conflicts raised above, the mayor has additional supervisory authority given him by statute. Specifically, K.S.A. 15-1407 states:

"The mayor shall be, ex officio, the commissioner of the police and fire departments, and shall have under his or her special charge, and be responsible for, the enforcement of all city ordinances and police regulations of such city, and have general supervision over the fire department . . . ."

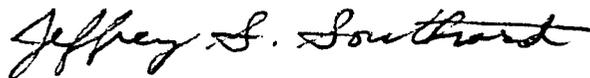
No more obvious example of incompatibility could be found than that which the present situation creates under this statute, for the same elected official who is supervising the fire department is also, as fire chief, running it. Public policy would dictate that such situations, even if no improprieties occur, not be allowed to exist. Abry v. Gray, supra.

In conclusion, the common-law doctrine of incompatibility of offices precludes one person from holding the office of fire chief while at the same time serving as mayor or city commissioner in a city of the third class having the mayor-commissioner form of government. The doctrine is applicable due to the statutory authority of the mayor and commissioners over the fire chief, in that the latter official is supervised by the mayor, pursuant to K.S.A. 15-1407, and is appointed (and, if necessary, removed) by the commission, pursuant to K.S.A. 15-1601 et seq.

Very truly yours,



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