



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 106

Marvin W. Barkis
La Cygne City Attorney
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Paola, Kansas 66071

Re: Cities of the Third Class--Mayor-Council Form of
Government--Incompatibility of Officers Doctrine;
City Councilman Serving as Fire Chief

Synopsis: The doctrine of incompatibility of offices pre-
cludes one person from holding the position of
fire chief while at the same time serving as city
councilman in a city of the third class having
the mayor-council form of government. Cited
herein: K.S.A. 15-101, 15-204, 15-301, 15-1201,
15-1402, 15-1407.

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Dear Mr. Barkis:

As city attorney for the city of La Cygne, Kansas, you request our opinion concerning the simultaneous holding of two city offices by one person. Specifically, you ask whether it is proper for a city councilman to also serve as fire chief of the city's volunteer fire department. You inform us that a city councilman has also served as fire chief for the city of La Cygne, and that the fire chief and each member of the fire department receive compensation for services in the amount of ten dollars for each meeting attended, and ten dollars for each fire call answered.

Marvin W. Barkis

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In the absence of a charter ordinance, cities of the third class in Kansas (of which La Cygne is one) are provided an option by statute as to the form of city government they may have. The first, set out by K.S.A. 15-101 et seq. and currently in use in La Cygne, 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., 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 does not apply to La Cygne, in that a mayor-council, as opposed to a mayor-commission, form of government is in existence. Furthermore, no such statute exists for mayor-council cities. However, the absence of any specific statute on this point 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 incompatibility doctrine applies in those cases where two public offices are held by the same individual at the same time. 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." Id. at 149.

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:

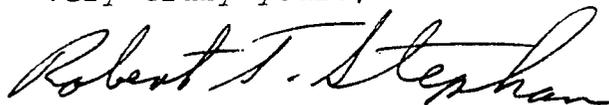
"[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbents of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other, 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 apparent that a fire chief appointed by the mayor and approved by the city council (pursuant to K.S.A. 15-204) would be subject to the latter, thus making the dual holding of both an appointive and an elective position incompatible. Members of the council, in addition to approving such appointees initially, specify their duties and compensation, and may remove any officer from office. In our judgment, it cannot be said that the simultaneous holding of the office of fire chief would not "in any way interfere with the duties" of a city councilman. For these reasons, it is our opinion that the appointment of a current elected city official to the office of fire chief would, under Kansas law, result in the ipso facto vacation by the official of the post to which he was

elected. The same would be true, but in reverse, if a person who is fire chief were elected to the council. Abry v. Gray, supra at 148-49.

In conclusion, it is our opinion that the doctrine of incompatibility of offices precludes one person from holding the position of fire chief while at the same time serving as a city councilman in a city of the third class having the mayor-council form of government.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:BJS:TRH:jm