



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 13, 1984

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

ATTORNEY GENERAL OPINION NO. 84-122

Mayor Jacqueline Carter
Ensign, Kansas 67841

Re: Cities and Municipalities -- Code for Municipal
Courts -- Clerk of the Municipal Court; Establishment
of Office; Appointment; Powers and Duties

Synopsis: The common law doctrine of incompatibility of
offices precludes one person from simultaneously
holding the offices of city council member and clerk
of the municipal court in a city of the third class
having a mayor-council form of government. Cited
herein: K.S.A. 12-4108.

* * *

Dear Ms. Carter:

On behalf of the governing body of the City of Ensign, you have
inquired whether the offices of city council member and clerk
of the municipal court are incompatible, so as to preclude the
simultaneous holding of both offices by one person.

Pursuant to K.S.A. 12-4108, the governing body of each city
may provide for the office of clerk of the municipal court, with
the clerk appointed by the municipal judge. The aforesaid
statute prescribes the following duties of the clerk of the
municipal court:

"The clerk shall issue all process of the court,
administer oaths, file and preserve all papers,
docket cases and set same for trial and shall

perform such further acts as may be necessary to carry out the duties and responsibilities of the court. The clerk shall receive, account for and pay to the city treasurer monthly all fines and forfeited bonds paid into the court. The clerk shall make reports to the judicial administrator and furnish the information when requested by the judicial administrator or a departmental justice on such forms furnished by the judicial administrator, and approved by the supreme court."

We are not aware of any statute which addresses the propriety of one person holding the offices of council member and clerk of the municipal court. Thus, resolution of your inquiry 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, 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, and subject in some degree to the other's re-visory power. Thus, two offices are incompatible 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 exercised is remote." (Footnotes omitted.)

In addition to the above-referenced tests of incompatibility, 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 incompatible. There, in noting that these offices served overlapping constituencies, we stated:

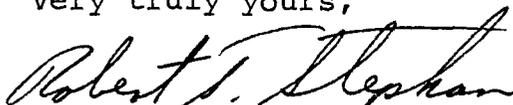
"[T]he respective duties and functions of these two offices are inherently inconsistent and repugnant, to the extent that one person cannot faithfully, impartially and efficiently discharge the duties of both offices. Furthermore, we believe that considerations of public policy render it improper for an incumbent to retain both. Even if the incumbent of one office were to abstain from discussing, 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." Id. at 6,7.

We believe that the same public policy considerations noted above are applicable here. The provisions of K.S.A. 12-4108 quoted above make it abundantly clear that the city governing body regulates the compensation of the clerk of the municipal court, has authority to audit the accounts of the clerk, and has the power to prescribe the bond to be executed by said officer. Although the clerk of the municipal court is under the exclusive jurisdiction and direction of the municipal judge [see Cook v. City of Topeka, 232 Kan. 334, 338 (1982)] and is subject to removal by the judge (as appointing authority) rather than the governing body (see 3 McQuillin, Municipal Corporations

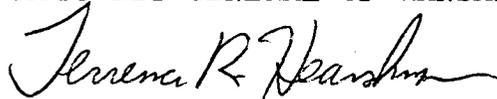
(3rd ed.) §12.112), these circumstances merely mitigate, but do not extinguish, the incompatibility inherent in the two offices. While it is arguable that a city council member can avoid a conflict with the functions and duties of the office of clerk of the municipal court by abstaining from voting on the matters pertaining to the office of clerk of the municipal court, we believe the public policy considerations noted in Opinion No. 79-248 negate such argument. In our judgment, the city council member'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 council member's abstention from voting on matters concerning the office of clerk of the municipal court would deprive his or her constituency of a representative who is free to make independent judgments on such matters.

Therefore, it is our opinion that the common law doctrine of incompatibility of offices precludes one person from simultaneously holding the offices of city council member and clerk of the municipal court 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,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Terrence R. Hearshman
Assistant Attorney General