STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

March 21, 1985

ATTORNEY GENERAL OPINION NO. 85- 30

Jerry L. Griffith
City Attorney
165 West First Street
P.O. Box 58
Hoisington, Kansas 67544

Re: Constitution of the United States--First Amendment--Restrictions on Political Activities of City Police Officers

Synopsis: A city personnel policy which prohibits a police officer from becoming a candidate for board member of a unified school district within the city is justified by the city's compelling interest in maintaining the integrity of its police department, and is constitutional as applied to prohibit the candidacy of a police captain. Cited herein: U.S. Const., First Amendment.

* * *

Dear Mr. Griffith:

You request our opinion as to whether a personnel policy of the City of Hoisington is constitutional as applied to a City Police Captain who is prohibited from becoming a candidate for the board of a unified school district within the City of Hoisington. The personnel policy provides as follows:

POLITICAL ACTIVITY

"The term 'political' as used herein refers to partisan politics, or nominations and elections to public office. The following political activity is prohibited:

> "1. No employee shall use his influence to further the cause of any political party, or candidate for nomination or election to public office other than exercising his or her rights to vote.
>
> "2. No employee shall seek or accept nomination, election, or appointment as an officer of a political party, club or organization.
>
> "3. No employee shall be a candidate for a political office.
>
> "4. No employee shall solicit money, service or other valuable thing, or in any other way further the cause of any political party or candidate for nomination or election to public office." (Emphasis added.)

Initially, it should be noted that the above-quoted personnel policy may be facially invalid if it is "substantially overbroad" in regulating conduct protected by the First Amendment to the U.S. Constitution. See Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830 (1973). In this regard, measurement of the substantiality of a law's overbreadth requires a "rough balancing" of the number of valid applications compared to the number of potentially invalid applications. Magill v. Lynch, 560 F.2d 22, 30 (1977). As we are not fully apprised of how the city has interpreted and applied the above-quoted policy, it is not possible to provide an opinion as to whether it is "substantially overbroad." Therefore, our opinion is limited to determining whether the policy is constitutional as applied in a specific situation, i.e. to prohibit a city police captain from becoming a candidate for a unified school district board.

The office of school board member is nonpartisan in nature, and it has been held that candidacy for such a public office is one of the rights included within the scope of the First Amendment, although it is not a "fundamental right." Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830 (1973); United States Civil Service Comm's v. National Ass'n of Letter Carriers, 413 U.S. 548, 37 L.Ed.2d 796 (1973); Clements v. Fashing, 457 U.S. 957, 73 L.Ed.2d 508 (1982). The Supreme Court in Broadrick and Letter Carriers, supra, did not hold that restrictions on nonpartisan political activities of public employees were unconstitutional, but simply upheld restrictions on partisan political

activities. Cummings v. Godin, 377 A.2d 1071, 1078 (R.I. Sup.Ct. 1977); see also Hickman v. City of Dallas, 475 F.Supp. 137 (1979) and Magill v. Lynch, 560 F.2d 22 (1977).

However, it has been held that the validity of restrictions on non-partisan political activity of public employees can be tested in the same manner as restrictions on partisan political activity. Hickman v. City of Dallas, supra. That test is as follows:

> "[R]estrictions on the partisan political activity of public employees and officers, where such activity contains substantial non-speech elements, see U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), are constitutionally permissible if justified by a reasonable necessity, see Bullock v. Carter, [supra], to burden those activities to achieve a compelling public objective." Morial v. Judiciary Commission, 565 F.2d 295, 300 (5th Cir., 1977) (enbanc) cert. den. 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395. (Emphasis added.)

In Hickman, supra, the court considered a provision of the Dallas City Charter which prohibited city employees from campaigning for or holding elected public office within Dallas County. Plaintiff, a Dallas patrol officer who desired to become a candidate for the nonpartisan office of city council member of the City of DeSoto in Dallas County, sought to have the charter provision declared unconstitutional.

Applying the test quoted above, the court held that the City of Dallas had a compelling interest in maintaining the loyalty, efficiency and nonpartisanship of its employees, and that such interest was sufficiently compelling that the city could put restrictions on the right of its employees to become candidates for elective office, including nonpartisan elective offices of the City of Dallas. However, the court held that any harm to Dallas' compelling interests resulting from plaintiff's candidacy for DeSoto City Council was purely speculative, and stated as follows:

> "[T]he fact that the race and the position are nonpartisan clearly reduces the potential for interference with the compelling objectives of Dallas and, at the same time, strengthens the view that Hickman's right to be a candidate should not be denied." 475 F.Supp. at 141.

Accordingly, the court ruled that the subject provision of the Dallas City Charter was unconstitutional as applied to the plaintiff.

It is important to note that the restrictions which were struck down in the Hickman case related to nonpartisan activity occurring entirely outside the city, i.e. running for nonpartisan office in a different city. As noted above, the candidacy at issue here relates to a school district operating within the City of Hoisington. The importance of this distinction is demonstrated by the case of Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983).

In Wachsman, police officers and firefighters of the City of Dallas challenged charter provisions which prohibited city employees from managing a partisan political campaign, or soliciting or receiving funds for such a campaign. While the court stated that it would be "questionable" to apply these restrictions to noncandidate elections (such as elections on state constitutional amendments) and to elections and related activity occurring entirely outside Dallas (such as solicitation of funds for a candidate running for city office in Fort Worth), the court upheld the restrictions as they related to other local partisan elections. We find the following reasoning of the court persuasive:

> "[W]e conclude that while the case at bar does not present as close a nexus between the nonemployer elections and the affairs of the employer governmental entity imposing the restrictions on its employees as does the Hatch Act, nevertheless such a nexus is not entirely lacking here. We believe it unrealistic to assume that politics within the geographical boundaries of a city are divided into completely unrelated watertight compartments of city and noncity politics. On the candidate and officeholder level, it is certainly not unheard of for a person prominent in local partisan politics, as a former officeholder or otherwise, to become a city councilperson in a nonpartisan election, or for a member of the nonpartisan city council to thereafter become a local, state, or even federal elective officeholder through the partisan political process. Moreover, significant operating relationships frequently exist within the geographical area of a city,

between the city government, whether partisan or not, and the county, state, and federal governments. City politics, then, whether or not 'partisan,' cannot be viewed as wholly divorced from the politics, within the area of the city, of the local, state, and federal governments.

. . . .

"Finally, appellants' challenge to these portions of the Charter fails to recognize the considerable power wielded by public employees by virtue of their positions. Of necessity, individual governmental employees, as a practical matter, often have considerable discretion in the actual administration and enforcement of laws and the provision of governmental services. And, the timing, manner, and nature of the performance of such governmental functions in actual practice may frequently be subject to variation according to the attitudes of the governmental employees concerned. A Dallas private citizen might well be hesitant to refuse a political contribution or favor sought by a campaign manager or solicitor in a county, legislative or congressional campaign if the private citizen were dependent on that campaign manager or solicitor for fire or police protection or were subject to discretionary law or regulatory enforcement actions by that campaign manager or solicitor. Certainly the City has a legitimate interest in minimizing the exposure of its citizens to such pressures from city employees. And the Dallas private citizen is no less pressured simply because the election campaign for which the contribution or favor is sought by the city employee is for an office such as sheriff of Dallas County, or a local legislative or congressional seat, rather than for a place on the Dallas city council.

Accordingly, the City has a significant interest in limiting the activities of its employees in local 'partisan' campaigns. While these interests are somewhat less extensive than those present in city council elections, the restrictions

> imposed are less onerous, and less fundamental employee rights are involved. Therefore, we uphold these provisions." (Emphasis added.) 704 F.2d at 171-172.

Additionally, we note that a Massachusetts court has upheld a regulation of the police commissioner of the City of Boston which requires police officers to take a leave of absence upon becoming a candidate for election to any office under the federal, state or city government. Boston Police Patrol Ass'n v. City of Boston, 326 N.E.2d 314 (Mass. Sup. Jud. Ct. 1975). The court's opinion recites the following city interests promoted by such a rule:

> "The commissioner could reasonably infer that permitting him [the police officer] to remain on duty while campaigning for elective office could create a conflict of interest which could impede his efficient performance of his duty and could undermine and impair the integrity and discipline of the law enforcement agency. For example, he might be reluctant to interrogate fully, to arrest, or otherwise to enforce the law against a citizen who might have the power to affect substantially the outcome of the campaign."

In accordance with the above authorities, it is our opinion that a city personnel policy which prohibits a police officer from becoming a candidate for board member of a unified school district within the city is justified by the city's compelling interest in maintaining the integrity of its police department, and is constitutional as applied to prohibit the candidacy of a police captain.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Terrence R. Hearshman

Terrence R. Hearshman
Assistant Attorney General

RTS:JSS:TRH:jm