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ATTORNEY GENERAL OPINION NO. 85- 31

William T. North  
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Cottonwood Falls  
Masoner & North  
Cottonwood Falls, Kansas 66845

Re: Cities of the Third Class--Election, Appointment  
and Removal of Officers--Qualifications of Officers;  
Incompatibility of Offices

Synopsis: The common law doctrine of incompatibility of offices  
precludes one person from simultaneously holding the  
offices of city council member and county clerk.  
Cited herein: K.S.A. 79-1965, 79-5004.

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Dear Mr. North:

You request our opinion as to whether the offices of city council member and county clerk are incompatible, so as to preclude the simultaneous holding of both offices by one person. As we are not aware of any statute which addresses the propriety of one person holding both the aforesaid offices, resolution of your inquiry requires application of the common law doctrine of incompatibility of offices.

There are several principal Kansas cases concerning 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." 58 Kan. at 149.

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 inteferes 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.

In reading these cases together, it is apparent that the Kansas Supreme Court has determined that incompatibility of offices involves 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 63A Am.Jur.2d, Public Officers and Employees §78, it is stated:

"Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. They 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. . . . Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously, in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated." (Emphasis added.)

In regard to whether there is an inconsistency in the functions of the offices of city council member and county clerk, we note that K.S.A. 79-1965 prescribes that the county clerk shall reduce any excessive tax levy certified by a taxing subdivision. Additionally, K.S.A. 79-5004 requires the county clerk to adjust aggregate city tax levies so as to comply with the "tax lid," and also provides as follows:

"Whenever one or more county clerks shall disagree with the governing body of a taxing subdivision concerning the maximum amount of the aggregate tangible property tax levies permitted under this act for such taxing subdivision, the disagreement may be submitted to the state board of tax appeals by any such county clerk or by the governing body of such taxing subdivision, and the disagreement shall thereupon be promptly and conclusively determined by the state board of tax appeals."

Under the above-referenced statutes, the county clerk serves as a "check" upon taxing subdivisions to ensure that they have complied with laws limiting tax levies. In our judgment, the protection afforded by these statutes would be compromised if the county clerk were a member of the governing body of a taxing subdivision. 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 county clerk.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
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