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ATTORNEY GENERAL OPINION NO. 87- 2

The Honorable Robert G. Frey
State Senator, Thirty-Eighth District
P.O. Box 1177
Liberal, Kansas 67901-1177

Re: Constitution of the State Kansas--
Judicial--Compensation of Justices and Judges;
Certain Limitation

Synopsis: The term "salaried officer of the state," as used in Article 3, Section 13 of the Kansas Constitution, refers to any person holding a salaried state office. Common law criteria set out in Durflinger v. Artiles, 234 Kan. 502 (1983) must be applied to determine whether a person holding a specific state position is a state officer. Cited herein: K.S.A. 25-2505, 75-4301; L. 1972, ch. 390 and 392; Kan. Const., Art. 1, §15; Kan. Const., Art. 3, §13.

* * *

Dear Senator Frey:

You request our interpretation of Article 3, Section 13 of the Kansas Constitution. Specifically, you ask who is a "salaried officer of the state" under the terms of the aforesaid constitutional provision.

Article 3, Section 13 relates to compensation of justices and judges, and provides as follows:

> "The justices of the supreme court and judges of the district courts shall receive for their services such compensation as may be provided by law, which shall not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state. Such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States except as may be provided by law, or practice law during their continuance in office." (Emphasis added.)

Article 1, Section 15 of the Kansas Constitution contains a similar limitation relating to reduction of compensation provided to executive officers enumerated in Article 1, to wit:

> "The officers mentioned in this article shall at stated times receive for their services such compensation as is established by law, which shall not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state. Any person exercising the powers and duties of an office mentioned in this article shall receive the compensation established by law for that office." (Emphasis added.)

The underscored language in both the above-quoted constitutional provisions was added by constitutional amendments adopted in 1972. See L. 1972, ch. 390 and 392. Our research indicates that the limitation contained within Article 3, Section 13 (as well as the same limitation appearing within Article 1, Section 15) was extracted from the Constitution of the State of Alaska, and it is therefore appropriate to review court decisions interpreting the identical language within that state's constitution.

In Hudson v. Johnstone, 660 P.2d 1180 (Alaska 1983), the Supreme Court of Alaska, in the course of interpreting the phrase "term of office," discussed the purpose of the proscription against diminishing the compensation of justices:

> "To hold otherwise would, in our judgment, vitiate the proscription against

> diminishing the compensation of justices and judges during their terms of office. In discussing the compensation clause found in article III, Section 1 of the federal constitution, the United States Supreme Court has noted:
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> "'The Compensation Clause has its roots in the longstanding Anglo-Amercian tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. . . . Hamilton, in The Federalist No. 79, p. 491 (1818) (emphasis deleted), emphasized the importance of protecting judicial compensation:'
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> "'"In the general course of human nature, a power over a man's subsistence amounts to a power over his will."'
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> "United States v. Will, 449 U.S. 200, 217-18, 101 S.Ct. 471, 482, 66 L.Ed.2d 392, 407-08 (1980). That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear: 'There is no doubt that judicial independence was a paramount concern of the delegates . . . .' Buckalew v. Holloway, 604 P.2d 240, 245 (Alaska 1979) (footnote omitted); see 1 Proceedings of the Constitutional Convention 586-602." 660 P.2d at 1184-1185.

In accordance with the above-quoted authority, it is our opinion that the underlying purpose of the proscription against diminishing judicial compensation was to assure an independent judiciary. This purpose provides guidance as to how the term "salaried officer of the state" should be interpreted. Specifically, it is clear that the determination of who is an officer must be made without reference to any statutory definition (see, e.g., K.S.A. 25-2505(b) and K.S.A. 75-4301), since use of any such method of construction

would enable the legislature to manipulate the concept of a public office, thereby reducing the protection afforded to justices under Article 3, Section 13. Accordingly, it is our opinion the term "officer" in Article 3, Section 13 refers to the common-law concept of a public officer. That concept was discussed by the Kansas Supreme Court in Durflinger v. Artiles, 234 Kan. 502 (1983), wherein the court held that the Superintendent of Larned State Hospital was a public officer (and that staff physicians at the hospital were not officers):

> "In Sowers v. Wells, 150 Kan. 630, 95 P.2d 281 (1939), this court was asked what is a 'public office' and who is a 'public officer'? 150 Kan. at 633. In response the court answered:
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> "'While the authorities are not in complete harmony in defining the term "public office," or "public officer," it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of "public office."' 150 Kan. at 633.
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> "See also Steere v. Cupp, 226 Kan. 566, 572, 602 P.2d 1267 (1979). Two years before Sowers, this court in Miller v. Ottawa County Comm'rs, 146 Kan. 481, 71 P.2d 875 (1937), stated:
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> "'The distinction between an officer and an employee is that the responsibility for results is upon one and not upon the other. There is also upon an officer the power of direction, supervision and control. The distinction between a public officer and an employee is concisely made in 22 R.C.L. 379, in the following language:'
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> "'"A public officer is not the same thing as a contract, and one contracting with the government is in no just and proper sense an officer of the government. The converse is likewise true and an appointment or election to a public office

does not establish a contract relation between the person appointed or elected and the public.'"

. . . .

"'In 53 A.L.R. 595 it is stated:'

"'"It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements." (See, also, 93 A.L.R. 332.)' 146 Kan. at 484-85. (Emphasis supplied.)"'

"See also 63 Am.Jur.2d, Public Officers and Employees §11, p. 634, and generally §§1-14; Annot., Distinction between Office and Employment, 140 A.L.R. 1076; and 35 Words and Phrases, Public Officer, pp. 408-14 (1963).

"In 63 Am.Jur.2d, Public Officers and Employees §1, at p. 625, it is commented:

"'A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract.'

"Black's Law Dictionary (5th ed. 1979), has defined public office and public official.

"'Public office. Essential characteristics of "public office" are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government; key element of such test is that "officer" is carrying out sovereign function. Spring v. Constantino, 168 Con.. 563, [568-69,] 362 A.2d 871, 875 [(1975)]. Essential elements to establish public position as "public office" are: position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity. State v. Taylor, 260 Iowa 634, [639,] 144 N.W.2d 289, 292 [(1966)]. p. 1107.'

"'Public official. The holder of a public office though not all persons in public employment are public officials because public official's position requires the exercise of some portion of the sovereign power, whether great or small. Town of Arlington v. Bds. of Conciliation and Arbitration, (370 Mass. 769), 352 N.E. 2d 914 [(1974)]. p. 1107.'

"In the case before us Dr. G. W. Getz, superintendent of the Larned State Hospital was granted summary judgment by the trial court on the basis he was a public officer and hence immune from liability. The 'Act of Obtaining Care and Treatment for a Mentally Ill Person' (K.S.A. 1973 Supp. 59-2901 et seq.) placed many duties upon Dr. Getz as the 'head of the hospital.' Among such duties were authority to discharge a mental patient no longer in need of care or

treatment (K.S.A. 1973 Supp. 59-2924); discretionary authority to grant convalescent leave to a patient (K.S.A. 1973 Supp. 59-2924); and authority to command any peace officer or other person to take into custody a patient who was absent from the hospital without leave and to transport same back to the institution (K.S.A. 1973 Supp. 59-2926).

"By contrast no similar grants of authority are given to staff physicians who were part of the unclassified service under the Kansas Civil Service Act (K.S.A. 1973 Supp. 76-12a03). K.S.A. 1973 Supp. 76-12a03 provided any physician could be removed by the Director of Mental Health & Retardation Services. Further, the Director was empowered to make all assignments and reassignments of physicians to the institutions. The staff doctors were under the control and supervision of the head of the hospital, Dr. Getz, and the Director of Mental Health & Retardation Services. (K.S.A.. 1973 Supp. 76-12a06.)

"In Jagger v. Green, 90 Kan. 153, 133 Pac. 174 (1913), Mr. Jagger had been discharged from his position as a field man for the Kansas City health department on the rationale he was a public officer rather than a government employee and therefore not protected by civil service laws. Mr. Jagger brought an action in mandamus to compel the Board of Commissioners for Kansas City to recognize his position was subject to civil service. In holding for Mr. Jagger this court commented:

"'The health commissioner is the only person connected with the department of public health who holds a position analogous to an office. The field men are merely subordinate employees who work under his direction and supervision and for whose conduct he is responsible. . . .

> [T]he field men possess no other authority which rises to the dignity of corporate power officially vested. It is not important that the ordinance uses the term "officers" in one place in speaking of the appointees in the health department. Considering the nature of the service, its relative importance, its essentially subservient character, and the placing of responsibility for results upon a superior who is given full power of direction, supervision and control, it must be held that the plaintiff was not a city officer within the meaning of the statute just referred to.'
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> "'Since the plaintiff is not one of the appointive officers or employees excepted from the operation of the civil service act, he is entitled to claim the benefit of its provisions.' 90 Kan. at 158.
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> "In Jones v. Botkin, 92 Kan. 242, 139 Pac. 1196 (1914), a nurse-cell attendant at the state hospital for the criminally insane, was fired by a warden. The warden argued Jones was a public officer serving at the warden's pleasure. This court held Jones was a public employee of the institution and accordingly, protected by the civil service act."

In accordance with the above-quoted authorities, it is our opinion that the term "salaried office of the state," as used in Article 3, Section 13 of the Kansas Constitution, refers to any person holding a salaried state office. Common law criteria set out in Durflinger v. Artiles, 234 Kan.

502 (1983) must be applied to determine whether a person holding a specific state position is a state officer.

Very truly yours,

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