



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 121

Robert C. Foulston
700 Fourth Financial Center
Broadway at Douglas
Wichita, Kansas 67202

Re: Courts--Supreme Court--Qualifications of Justices
Courts--Court of Appeals--Qualifications of Judges

Synopsis: K.S.A. 20-105 provides that to be qualified to hold the office of justice of the supreme court or judge of the court of appeals, a person must have been regularly admitted to practice law in Kansas and have engaged in the active and continuous practice of law for a period of at least ten years prior to the date of appointment as justice or judge. Though the strict definition of "active practice" would require that the legal activities of the person in question be pursued on a full-time basis and constitute his regular business, the general rule that statutory provisions imposing qualifications for office should be construed in favor of those seeking to hold office would serve to soften this requirement. Thus, a potential nominee need not be a full-time trial attorney to be considered as actively engaged in the practice of law, and is not automatically disqualified merely for holding a position which does not require legal expertise. Cited herein: K.S.A. 20-105; 20-3002; K.S.A. 1986 Supp. 22-3707.

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Dear Mr. Foulston:

As Chairman of the Supreme Court Nominating Commission, you request our opinion regarding the qualifications of several potential nominees. Your specific questions are as follows:

- "1. Is an administrative law judge working for the United States performing duties as a hearing officer in and out of Kansas qualified?
- "2. Is a Systemic Branch Chief and Legal Analysis [sic], U.S. Department of Housing and Urban Development qualified?
- "3. Is an Equal Employment Specialist, U.S. Department of Energy qualified?
- "4. Is a Director of the Kansas State Equal Employment Office qualified?
- "5. Is the Special Assistant to the Regional Administrator for the General Service Administration qualified?
- "6. Is the Vice Chairman of the Kansas Parole Board qualified?
- "7. Is a U.S. Army Judge Advocate teaching school courses in military criminal law, procurement and industrial law qualified?
- "8. Does a Kansas attorney whose sole practice has been with the U.S. Army Judge Advocate Corp outside of Kansas qualify?"

You inquire as to whether the potential nominees who are or were engaged in these positions would be considered as actively practicing law.

K.S.A. 20-105 prescribes qualifications for justices of the Kansas Supreme Court [which qualifications also apply to judges of the Kansas Court of Appeals (K.S.A. 20-3002)], and provides as follows:

"No person shall be qualified to hold the office of justice of the supreme court, unless such person shall have been regularly admitted to practice law in the state of Kansas and has engaged in the active and continuous practice of law, as a lawyer, judge of a court of record or any court in this state, full-time

teacher of law in an accredited law school or any combination thereof for a period of at least ten (10) years prior to the date of appointment as justice."
(Emphasis added.)

In a previous opinion this office noted that the common definition of the word "practice" is "to do or perform habitually or customarily; to acquire or polish a skill; to work at, especially as a profession "[The American Heritage Dictionary, New College Edition (1976)], and that, consistent with this definition, the Kansas Supreme Court construed the term "actively performed legal services" contained in Supreme Court Rule 703(a)(3) as requiring that the legal activities of the person in question be pursued on a full-time basis and constitute his regular business [In re Application of Stormont, 238 Kan. 627, 629 (1986)]. See Attorney General Opinion No. 86-160. It was also noted, however, that had the Court been interpreting K.S.A. 20-105, a statute, it may not have applied such a strict construction as it did to its own rule. We stated that, as a general rule, "statutory provisions imposing qualifications for office should be construed [liberally] in favor of those seeking to hold office;" citing 67 C.J.S., Officers §17 (1978). Thus, it was concluded that an attorney need not be a trial lawyer to be considered as actively engaged in the practice of law, and that a nominee is not automatically disqualified merely for holding certain positions. In other words, it is not the position held which is determinative, but rather the functions performed by the potential nominees while in those positions and the degree of legal activity. Attorney General Opinion No. 86-160.

Turning to your specific questions, we will address them in the order in which they were asked.

"Is an administrative law judge working for the United States performing duties as a hearing officer in and out of Kansas qualified?"

K.S.A. 20-105 provides that the qualifying experience may be gained as a lawyer, a judge of a court of record or any court in this state, or a full-time teacher of law in an accredited law school, or any combination of these three. For purposes determining whether a federal administrative law judge is a judge of a court of record or any court in this state, there are two issues to be addressed: First, whether an administrative body may be a court of record and second,

whether this experience must have been gained in the State of Kansas. In Attorney General Opinion No. 86-7 we indicated that "the grammatical structure of the statute leads one to conclude that the qualifying experience as a judge must be acquired in this state, while experience as a lawyer or law school professor may be acquired outside the State of Kansas." However, there is no indication that judicial experience must be gained exclusively in the State of Kansas. If the judge in question hears cases on a regular basis in this state, hearing cases in other states as well should not preclude him from consideration. However, we do not believe a federal administrative law judge is a judge of a court of record or any court in this state. The general definition of a court of record is a court that is required to keep a record of its proceedings, and that may fine or imprison. Black's Law Dictionary, 319 (5th ed. 1979). Additionally, "[t]he phrase 'court of record,' as employed in state statutes, has been construed as restricted to state or federal courts within the state in question." 21 C.J.S. Courts §5 (1940). Though federal administrative law judges may be required to keep records of the proceedings before them, we do not believe such an administrative body may be classified as a "court" within this state which may fine or imprison, at least for purposes of qualifying as a judge of a court of record under K.S.A. 20-105.

This does not, however, necessarily preclude this individual from being a qualified potential nominee. It is the opinion of this office that a federal administrative law judge may meet the qualification as a lawyer. The functions performed by a hearing officer include analyzing legal arguments, making conclusions of law, and drafting legal opinions. If the Commission finds that these functions were performed on a regular and continuous basis, it may find that the potential nominee was engaged in the active practice of law as a lawyer.

"Is a Systemic Branch Chief and Legal Analys[t], U.S. Department of Housing and Urban Development qualified?"

As mentioned previously, the fact that a potential nominee has held a particular position does not automatically qualify or disqualify him. What is important is whether in a particular position, the legal activities of the potential nominee were pursued on a full-time basis and constituted his regular business, i.e. whether he actively engaged in the practice of law while holding that position. The nominee in question here has stated that he performed legal analysis while engaged

in this position; indeed, the position title would indicate that legal analysis is in the job description. Legal analysis, legal research, and the giving of legal advice are considered as much the practice of law as litigation. The question here becomes the degree to which legal analysis was made in this position; if on a regular basis, the practice was active, if only incidentally, it was not.

"Is an Equal Employment specialist, U.S. Department of Energy qualified?"

The above-considerations also apply here, however, it is our opinion that the degree of legal analysis, research and advice need not be as high as in the previous situation because the position now in question was held for only a four month period.

"Is a Director of the Kansas State Equal Employment Office qualified?"

Again, if the potential nominee can demonstrate continuous and active legal research or legal analysis, the mere holding of this position would not disqualify him. The potential nominee states that no legal advice is given in this capacity, but adds that the matters handled by him nevertheless draw upon his legal training and experience. This also appears to be a question of degree.

"Is the Special Assistant to the Regional Administrator for the General Service Administration qualified?"

For purposes of this question, it is important to note that the potential nominee clearly was engaged in the active and continuous practice of law from September, 1972 to May, 1987. It is only the last three months of the potential nominee's career which is in question. We note also that K.S.A. 20-105 does not explicitly require that the 10 years of experience immediately precede the appointment as justice or judge of the appellate courts, though the spirit of the statute would dictate that the experience be maintained up to the time of appointment. The potential nominee states that his appointment as Special Assistant entails legal and administrative duties. Considering the circumstances outlined above, it is our opinion that this particular short-term appointment which requires some legal functions would not serve to disqualify this potential nominee.

"Is the Vice Chairman of the Kansas Parole Board qualified?"

This potential nominee lists the duties of parole board members as follows:

"We determine paroles for all inmates in Kansas prisons; parole revocation hearings; clemency and pardon recommendations to the Governor; discharge of parole and initial hearings. Case load involves approximately 350 inmates monthly with three Parole Board members. During the hearings, we question the inmate, review the facts of each case, programming of inmate, and determine suitability of the inmate to spend the remainder of his sentence in society. We must weigh the seriousness of the crime and societal views and safety in this important discretion."

Parole board members are not required to have legal expertise. K.S.A. 1986 Supp. 22-3707. However, as stated in Attorney General Opinion No. 86-160, "[t]hough the position does not require legal expertise, it certainly does not preclude one holding that position from practicing law and in fact provides an ideal forum for one to do so." In Opinion No. 86-160, we were discussing the position of Kansas Corporation Commissioner who functions as a "hearing officer." That instance is similar to the one now before us in which the entire Parole Board sits as a kind of "hearing officer" during revocation hearings and discharge of parole and initial hearings. It is our understanding that the Parole Board members make conclusions of law as well as findings of fact in these hearings. While a Parole Board member may practice law while in this position, the Nominating Commission may desire additional information to determine whether this particular Parole Board member actually did engage in the active practice of law while employed in this position.

"Is a U.S. Army Judge Advocate teaching school courses in military criminal law, procurement and industrial law qualified?"

This office has not been provided with sufficient information to adequately address this question. It would appear, however, that if this potential nominee teaches law on a full-time basis, and if the school for which he teaches is an accredited law school, then he would be qualified. If not, he

may still qualify as a lawyer engaged in the active practice of law, depending upon the degree of his legal activities.

"Does a Kansas attorney whose sole practice has been with the U.S. Army Judge Advocate Corp. outside of Kansas qualify?"

It seems apparent that the functions performed by this potential nominee from 1973 to present constitute the practice of law and, judging from the nominee's statement, the practice was active and continuous. The question appears to be whether the fact that this person practiced in a state other than Kansas has any bearing on his qualifications. In Attorney General Opinion No. 86-7 we concluded that an attorney who has been regularly admitted to practice law in the State of Kansas, and who has engaged in the active and continuous practice of law in Kansas or any other state for a period of at least 10 years prior to his or her appointment as a justice (or judge), is qualified to hold the office of justice of the Kansas Supreme Court, or judge of the Kansas Court of Appeals. We concur with that conclusion.

In summary, K.S.A. 20-105 provides that to be qualified to hold the office of justice of the supreme court or judge of the court of appeals, a person must have been regularly admitted to practice law in Kansas and have engaged in the active and continuous practice of law for a period of at least ten years prior to the date of appointment as justice or judge. Though the strict definition of "active practice" would require that the legal activities of the person in question be pursued on a full-time basis and constitute his regular business, the general rule that statutory provisions imposing qualifications for office should be construed in favor of those seeking to hold office would serve to soften this requirement. Thus, a potential nominee need not be a full-time trial attorney to be considered as actively engaged in the practice of law, and is not automatically disqualified merely for holding a position which does not require legal expertise.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General