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ATTORNEY GENERAL OPINION NO. 89- 76

Larry R. Baer
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Newton, Kansas 67114

Re: Cities of the Second Class--Mayor-Council Form of
Government--Incompatibility of Officers Doctrine

Synopsis: The doctrine of incompatibility of offices precludes one person from holding the office of reserve police officer while at the same time serving as a city council member in a city of the second class having the mayor-council form of government. However, as stated in Attorney General Opinion No. 81-74, a person could hold the office of council member and still serve as a member of a volunteer fire department, as such volunteers are neither officers nor employees of the city for the purposes of the doctrine.

* * *

Dear Mr. Baer:

You request our opinion concerning the simultaneous holding of two city offices by one person. Specifically, you ask whether the positions of reserve police officer and city council member are incompatible so as to preclude an individual from holding both positions. Additionally, you ask whether a person may simultaneously hold the positions of volunteer fire department member and city council member in the city of Halstead.

The decisions of the Kansas Supreme Court do not permit an individual to hold more than one public office if there is an "incompatibility" between the offices. Dyche v. Davis, 92 Kan. 971 (1914); Congdon v. Knapp, 106 Kan. 206 (1920). The incompatibility doctrine applies in those cases where two public offices are held by the same individual at the same time. In Abry v. Gray, 58 Kan. 148 (1897), the Kansas Supreme 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 when 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." Id. at 149.

Subsequently in Dyche v. Davis, supra 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.

And, in Congdon v. Knapp, supra, 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.

General authorities also provide practical guidance on the types of interference which gives rise to incompatibility. 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 incumbents 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, as 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.

It should be noted that the Kansas Supreme Court has held that police officers are clothed with such extensive powers that they must be considered public officers. Haney v. Cofran, 94 Kan. 332, 334 (1950).

Applying the above principles to the offices involved here, it is apparent that a reserve police officer appointed by the mayor and approved by the city council would be subject to the latter, thus making the dual holding of the offices of council member and reserve police officer incompatible. Additionally, in the city of Halstead, the governing body may remove a reserve police officer from office. In our judgment, it cannot be said that the simultaneous holding of the office of reserve police officer would not "in any way interfere with the duties" of a city council member.

In regard to your second question, we noted in Attorney General Opinion No. 81-74 that a person could hold the office of council member and still serve as a member of the volunteer fire department, as such volunteers are neither officers nor employees of the city for the purposes of the incompatibility of offices doctrine. We have reviewed the ordinances of the city of Halstead related to the volunteer fire department, and it is our opinion that the conclusion set forth in Attorney General Opinion No. 81-74 applies to the city of Halstead.

In summary, it is our opinion that the doctrine of incompatibility of offices precludes one person from holding the office of reserve police officer while at the same time serving as a city council member in a city of the second class having the mayor-council form of government. However, as stated in Attorney General Opinion No. 81-74, a person could hold the office of council member and still serve as a member

of a volunteer fire department, as such volunteers are neither officers nor employees of the city for the purposes of the doctrine.

Very truly yours,



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