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June 2, 1992

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ATTORNEY GENERAL OPINION NO. 92- 72

The Honorable Jim Ward
State Senator, Twenty-Ninth District
423 S. Martinson
Wichita, Kansas 67213

Re: Cities of the First Class; Government by Mayor and
Council and General Laws--Elections--Ordinance
Prohibiting City Firefighter From Running for
City Council; Constitutionality

Constitution of the United States--Freedom of
Speech--Restrictions on Public Employees' Political
Activities

Synopsis: The city of Wichita may prohibit a city
firefighter from running for city council without
violating the firefighter's first amendment
rights. Cited herein: U.S. Const., Amend. I.

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Dear Senator Ward:

As senator for the twenty-ninth district you request our legal
opinion on the constitutionality of section 7, part 9(b) of
the city of Wichita's personnel manual, which prohibits city
employees from participating in various political activities.
This part of the manual provides:

"City employees are neither appointed to
nor retained in City employment based on
their political affiliations. It is an

employee's duty and right to register and to vote on all political issues. Employees may become involved in political activity, as provided in the subparagraphs below.

"a. As private citizens, employees may participate in all political activity, including holding office, except for City Council elections.

"b. In City Council elections, employees may privately encourage and support candidates to run for office and contribute in-kind labor and time to candidates and organizations that endorse candidates. Employees are not permitted to be candidates for the City Council, to make in public individual and personal endorsements of a candidate or to make cash contributions to a candidate.

"c. Political activity must not interfere with job attendance or performance. City facilities, equipment and uniforms may not be used in any political activities.

"d. In their capacities as City employees, employees may not represent to the public, either verbally or in writing, positions contrary to public policy as determined by the City Council. Employees may discuss matters of employee working conditions which are under consideration by employee organizations.

"e. Employees who violate the restrictions in this policy are subject to disciplinary action, including termination. (R-12/87)"

You request this opinion on behalf of a Wichita firefighter who wants to run for the city council.

The above-quoted personnel policy would be facially invalid if it were "substantially overbroad" in regulating conduct protected by the first amendment of the United States Constitution. See Broadrick v. Oklahoma, 413 U.S. 601,

611-12, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Courts do not find statutes or regulations facially overbroad, however, when a limiting construction has been placed on them.

We are unaware of how these regulations have been applied or construed by Wichita. Our opinion, therefore is limited to the specific situation presented: is it constitutional to prohibit a city firefighter from running for city council. While there are other limitations on political activity continued in the regulation, only the prohibition on running for office will be considered for purposes of this opinion.

The United States Supreme Court has recognized that governmental entities may limit political activities of the entities' employees. In a landmark decision, United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), the Court was faced with a constitutional challenge to the hatch act which prohibited certain political activities by federal employees including taking "any active part in political management or in political campaigns." 330 U.S. at 78. The act was challenged on the basis that it extended its reach to an employee's activities on his free time, and was not only a violation of the employee's first amendment rights, but was constitutionally overbroad as well.

The Court, in upholding the constitutionality of the act, first noted that the right to be politically active is not absolute. 330 U.S. at 95-96. The Court said,

"We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that

these restrictions are unconstitutional."
330 U.S. at 102-03.

Mitchell was extended by the Court in two companion cases, United States Civil Service Commission v. Letter Carriers, 413 U.S. 548, 92 S.Ct. 2880, 37 L.Ed.2d 796 (1973), and Broadrick v. Oklahoma, supra. In Letter Carriers the Court again considered a constitutional challenge to the hatch act. The provision in question prohibited federal employees from taking an active part in political management or campaigns. The Court reaffirmed Mitchell and said,

"We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." 413 U.S. at 556.

The Court, in analyzing whether the prohibition was constitutional, employed a balancing test between the interests of the employees as citizens in commenting on matters of public concern, and the employer in promoting the efficiency of the public services it performs through the employees. 413 U.S. at 564.

In Broadrick, the Court used the same analysis in holding constitutional a state statute prohibiting state employees from soliciting money for political parties or candidates, belonging to a local committee for a candidate, or becoming involved in a campaign.

These holdings of the Court have been recognized in Kansas. In State ex rel. Stephan v. Johnson, 14 Kan.App.2d 542 (1990), appeal dismissed 244 Kan. 256, the Court of Appeals held constitutional a statute which prohibited an employee of a Kansas university from serving on the state board of education. The court said:

"Restrictions on the political activities of public employees by themselves do not violate the rights guaranteed by the First Amendment. Broadrick v. Oklahoma, 413 U.S. at 616-17. Like the Oklahoma statute at issue in Broadrick, K.S.A. 25-1904 is not a 'censorial statute, directed at particular groups or viewpoints.' Instead, it 'seeks to regulate political activity in an evenhanded and neutral manner.' 413 U.S. at 616. Thus, it does not violate the First Amendment." 14 Kan.App.2d at 549.

While Broadrick and Letter Carriers concerned prohibitions on partisan office holding, courts have extended the rationale to prohibitions on non-partisan political activity. In Ferguson Police Officers v. City of Ferguson, 670 S.W.2d 921 (Mo.App.1984), the court upheld the constitutionality of a portion of a city charter which prohibited employees from sponsoring any person as a candidate for councilman or taking an active part in an election campaign of a city councilman.

The court said,

"Section 29 is narrowly drawn in that it applies only to city council elections. City employees are allowed complete freedom to engage in other political activities. No restrictions are imposed on participation in county, state, or federal campaigns or advocating a position on other issues in Ferguson. City council members are the only elected

officials in Ferguson, and they determine who will serve as city manager and for how long. The city manager, in turn, has control over the termination of city employees. If the City is concerned about pressure being put on police officers to support certain candidates, about control over elections by city employees, about the appearance of bias in the delivery of public services, prohibiting political involvement in city council elections is a logical place to start. The burden placed on the employees is limited, and there is a close fit between the means and the end." 670 S.W.2d at 928-29.

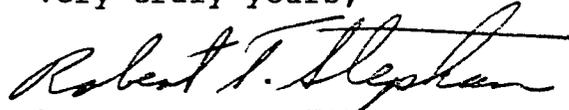
We also note that this office has opined that a personnel policy of the city of Hoisington which provided that "[n]o employee shall be a candidate for a political office" was constitutional when applied to prevent a police captain from running for the school board. Att'y Gen. Op. No. 85-80.

Wichita does have an interest in preventing its firefighters from running for the city council. A citizen, when faced with a firefighter campaigning for office, might feel that fire protection for his residence or business depended on supporting the firefighter's campaign. The city council might find it difficult to administer the fire department when faced with a fireman running for office. The prohibition on political activities of employees is a narrow one. The regulation only prohibits employees from running for city council. A wide range of political activity is available to the employees. It is our opinion that a city personnel regulation or policy which prohibits a firefighter from becoming a candidate for city council within the city is justified by the city's interest in maintaining the integrity of its fire department and the orderly administration of government and is constitutional as applied in this case.

We specifically do not consider other applications of the policy, and we do not consider subpart (d) which prohibits

employees from publicly taking positions contrary to the public policy determined by the city council.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steve Phillips
Assistant Attorney General

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