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April 11, 2014

ATTORNEY GENERAL OPINION NO. 2014- 10

Mark A. Tremaine, City Attorney
City of Lyons, Kansas
217 East Avenue South
P.O. Box 808
Lyons, KS 67554

Re: Cities of the Second Class—City Officers—Elective and Appointive Officers; Council Members, Election, Residence, Vacancy in Offices of Mayor or Council Member; Service as City Council Member and County Sheriff

Counties and County Officers—Sheriff—Sheriff; Election, Term, Bond; Qualifications for Office; Preservation of Peace; Service as County Sheriff and City Council Member; Incompatibility of Offices

Synopsis: The common law doctrine of incompatibility of offices precludes a person from concurrently serving as a mayor of a city of the second class operating under the mayor-council form of government and sheriff of the county in which the city is located. Cited herein: K.S.A. 14-109; 14-201; 14-207; 14-308; 14-310; 14-423; 14-516; 14-556; 14-560; 14-701a; 14-1302; 19-205; K.S.A. 2013 Supp. 19-801b; K.S.A. 19-811; 22-2202; K.S.A. 2013 Supp. 22-2401; Kan. Const., Art. 12, § 5.

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Dear Mr. Tremaine:

As city attorney for the city of Lyons, Kansas, you request our opinion regarding whether a person may concurrently serve as a member of the city council for a city of the second class operating under the mayor-council form of government and county sheriff. You request the opinion as one of the current city council members was elected to the office of county sheriff.

Cities of the second class may be governed by a council or a commission. If a second-class city is governed by a board of commissioners, a city commissioner is precluded from holding “any office of profit under the laws of any state or the United States, or . . . any county or other city office. . . .”¹ In addition, “no person holding any state, county, township or city office shall be eligible to the *office of county commissioner* in any county in this state.”² By their express provisions, those statutes apply to a member of a board of commissioners of a city of the second class and a county commissioner.³

We have not found similar prohibitions in the statutes regarding a member of a council for a city of the second class or county sheriff. We turn, therefore, to the common law doctrine of incompatibility of offices to determine whether such service is permitted.

The common law doctrine of incompatibility of offices prohibits an individual from holding more than one public office at the same time when there is an incompatibility between the offices.⁴ “Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other.”⁵ This is something more than a physical impossibility to discharge the duties of both offices at the same time.⁶ It is an inconsistency in the functions of the two offices.⁷ “A person holding both offices is confronted with the duty of faithfully, impartially and efficiently discharging the duties of these offices in the best interests of the respective constituencies,” a duty that may be impossible when the constituencies served by the public officer have competing interests.⁸

City Council Member

The council of each city constitutes the governing body of the city.⁹ Through its governing body, a city is empowered to determine its local affairs and government, subject only to specified legislative enactments.¹⁰ Appointments by the mayor of certain city officials, including a city marshal-chief of police and police officers, are subject to

¹ K.S.A. 14-1302.

² K.S.A. 19-205 (emphasis added).

³ “When a statute is plain and unambiguous, this court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.” *Cady v. Scholl*, 298 Kan. 731, _____, 317 P.3d 90, 96 (2014).

⁴ *Unified School District No. 501 v. Baker*, 269 Kan. 239, 249 (2000).

⁵ *Dyche v. Davis*, 92 Kan. 971, 977 (1914).

⁶ *Baker*, 269 Kan. at 248.

⁷ *Id.*

⁸ Attorney General Opinion No. 83-9.

⁹ See K.S.A. 14-109. See also Attorney General Opinion No. 86-110; 81-214.

¹⁰ Kan. Const., Art. 12, § 5. “Since the adoption of the home rule amendment in 1960, the Kansas legislature has repealed a number of statutory provisions describing in some detail the powers of governing bodies of cities of the second class, precisely because a statutory enumeration of those powers was no longer necessary.” Attorney General Opinion 80-166, quoting Attorney General Opinion No. 78-336.

consent of the council,¹¹ as are any of the mayor's grants of reprieve and pardon for offenses arising under city ordinances.¹² The council by state statute also possesses the authority to divide the city into wards for election purposes,¹³ appoint an elector to fill a vacancy on the council,¹⁴ and provide for municipal improvements.¹⁵

County Sheriff

A person is eligible for nomination, election or appointment to the office of sheriff unless the person "has been convicted of or pleaded guilty or entered a plea of *nolo contendere* . . . to any violation of . . . city ordinances relating to gambling, liquor or narcotics."¹⁶

It shall be the duty of the sheriff and undersheriffs and deputies to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner, may call to their aid such person or persons of their county as they may deem necessary.¹⁷

In addition, a sheriff is a law enforcement officer who may exercise law enforcement duties anywhere in the county,¹⁸ including within the municipal limits of a city.¹⁹

[I]f the sheriff believes the [city] police officers are failing to enforce the laws or properly investigate crimes, through neglect or inability to adequately perform their duties, the sheriff has not only the right but also the duty to act independently of such officers in the enforcement of state laws and the investigation of crime.²⁰

¹¹ K.S.A. 14-201. "Absent confirmation by the council, the appointee does not become a public officer of the city." Attorney General Opinion No. 83-86.

¹² K.S.A. 14-310.

¹³ K.S.A. 14-207.

¹⁴ K.S.A. 14-308.

¹⁵ See, e.g., K.S.A. 14-423 (streets and alleys); 14-516 (sewers); 14-556 (highways); 14-560 (streets); 14-701a (watercourses).

¹⁶ K.S.A. 2013 Supp. 19-801b(a).

¹⁷ K.S.A. 19-813.

¹⁸ K.S.A. 2013 Supp. 22-2401a(1). See also K.S.A. 22-2202(13) ("Law enforcement officer' means any person who by virtue of office or public employment is vested by law with a duty to maintain public order or to make arrests for violation of the laws of the state of Kansas or ordinances of any municipality thereof or with a duty to maintain or assert custody or supervision over persons accused or convicted of crime . . .").

¹⁹ Attorney General Opinion No. 82-274.

²⁰ *Id.*

“The sheriff of the county by himself or deputy shall keep the jail, and shall be responsible for the manner in which the same is kept,”²¹ and “shall receive all prisoners committed to the sheriff’s . . . custody by the authority of the United States or by the authority of any city located in such county. . . .”²² “The governing body of any city committing prisoners to the county jail shall provide for the payment of such compensation upon receipt of a statement from the sheriff of such county as to the amount due therefor from such city.”²³ Such compensation “may include expenses that relate to personnel, administration, facility operation and maintenance as well as direct prisoner expenses.”²⁴

After reviewing the respective roles of a council member of a city of the second class operating under the mayor-council form of government and a county sheriff, we believe the performance of the duties of one of those offices interferes with the performance of the duties of the other office to such a degree that the common law doctrine of incompatibility of offices precludes a person from concurrently serving in both offices. The decision of the council member/sheriff whether to consent to the mayor’s appointment of a highly qualified individual to city marshal-chief of police or police officer may be compromised if that individual has also applied for a position with the county sheriff’s department. Further, the decision of the council member/sheriff to exercise law enforcement authority within the municipal limits of a city may be affected by whether the officer acts as a council member supporting the efforts of the city’s police department or a sheriff desiring to provide consistent law enforcement throughout the county. Lastly, a city council member would likely prefer that charges for housing and keeping prisoners committed to the county jail not include expenses related to personnel, administration, facility operation and maintenance while a county sheriff may likely prefer to recoup all potential costs of housing and keeping the prisoners. Given the competing interests of the two offices, one person is precluded from concurrently serving in both positions.

Sincerely,

Derek Schmidt
Attorney General

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb

²¹ K.S.A. 19-811.

²² K.S.A. 19-1903. See also K.S.A. 19-811; 19-1930(a).

²³ K.S.A. 19-1930(a).

²⁴ Attorney General Opinion No. 2001-42.