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November 18, 2013

ATTORNEY GENERAL OPINION NO. 2013-19

Joanne Budler
State Librarian
State Capitol, Room 312-N
300 SW 10th Ave.
Topeka, KS 66612

Re: Cities and Municipalities—Libraries—City, County and Township Libraries;
Board

Synopsis: The head of a municipality who serves as an ex officio member of the library board should be counted in calculating the library board's quorum requirement.

The prohibition in K.S.A. 2013 Supp. 12-1222 on municipal officers being appointed to a municipal library board includes appointed officers as well as elected ones. The characteristics of public office are a position created by statute or ordinance, a fixed tenure, and the power to exercise some portion of the sovereign function of government. Cited herein: K.S.A. 12-1218; K.S.A. 2013 Supp. 12-1222; 14-201; K.S.A. 15-209; 75-4301a.

* * *

Dear Ms. Budler:

As the State Librarian, and on behalf of the Northeast Kansas Library System, you seek our opinion on two questions relating to municipal library boards. Both questions involve the following sentence in K.S.A. 2013 Supp. 12-1222:

In addition to the appointed members of the [library] board the official head of the municipality shall be ex officio a member of the library board with the same powers as appointed members, but no person holding any office in the municipality shall be appointed a member while holding such office.

Your first question is whether the official head¹ of the municipality, who serves as an ex officio member of the local library board, should be considered in calculating the library board's quorum requirement. The term "quorum" refers to the minimum number of members necessary to conduct business. When the quorum requirement is not fixed by statute, Attorney General opinions have consistently opined that a quorum "consists of a majority of the entire body."² Thus, if a library board has seven appointed members and one ex officio member, a quorum would be five total members if the ex officio member is counted, but only four appointed members if not.

Attorney General Opinion No. 79-94 discussed the head of the municipality's "ex officio" position on the library board. Noting that "ex officio" means "by virtue of the office," the opinion concluded that the term refers to how a member comes to serve on a body and is not itself a limitation on the member's power. Therefore, "in the absence of any limiting or qualifying language in the relevant statute, ex officio members of a municipal or regional library board have the same rights, privileges, powers and duties as members appointed to either board."³

Because the ex officio member has the same duties and powers as the appointed members, including the right to vote on matters before the board, it is our opinion that the ex officio member should be counted in calculating the quorum requirement. This conclusion is consistent with Attorney General Opinion No. 82-93, which opined that a county engineer who served as an ex officio member of the county planning board had the right to vote on board business and should be counted in determining the presence of a quorum.

Your second question relates to the prohibition in K.S.A. 2013 Supp. 12-1222 that "no person holding any office in the municipality shall be appointed a [library board] member while holding such office."⁴ You ask whether this prohibition applies to appointed as well as elected officers and if so, how municipal officers are to be distinguished from other municipal employees.⁵

Numerous state statutes,⁶ court decisions,⁷ and prior Attorney General opinions⁸ indicate that the term "officer" can include appointed individuals. Accordingly, we opine

¹ K.S.A. 12-1218 defines "official head" to mean the "mayor of a city, the chairman of the board of county commissioners of the county, and the township trustee of a township."

² See, e.g., Attorney General Opinion No. 02-41.

³ Attorney General Opinion No. 79-94.

⁴ This prohibition only applies to *appointed* positions on the library board and not the ex officio position, which will always be held by a municipal officer.

⁵ This opinion considers only K.S.A. 2013 Supp. 12-1222 and not the common law doctrine of incompatibility of offices.

⁶ See, e.g., K.S.A. 2013 Supp. 14-201 ("[T]he mayor shall appoint, by and with the consent of the council, a municipal judge of the municipal court, a city marshal-chief of police, city clerk, city attorney, and may appoint police officers and any other officers deemed necessary."); K.S.A. 15-209 ("The officers elected or appointed under this act shall be qualified electors of said city . . ."); K.S.A. 75-4301a ("Local government officer' means any elected or appointed officer of any governmental subdivisions or any of its agencies.").

that the phrase “any office in the municipality” in K.S.A. 2013 Supp. 12-1222 refers to appointed offices as well as elected ones. To interpret the phrase as referring to only elected positions would violate an important rule of statutory interpretation — that “a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it.”⁹

At the same time, it is clear that not all appointed municipal employees are municipal officers.¹⁰ The Kansas Supreme Court addressed the distinction between officers and other employees in *Durflinger v. Artilles*.¹¹ As summarized by Attorney General Opinion No. 99-11, *Durflinger* “concluded that the essential characteristics of public office are: (1) a position created by statute or ordinance, (2) a fixed tenure, and (3) the power to exercise ‘some portion of [the] sovereign function of government.’”¹² In addition, *Durflinger* cited an earlier case holding that an officer has “responsibility for results” and the “power of direction, supervision, and control.”¹³

Attorney General Opinion No. 99-11 applied *Durflinger* to determine whether the Public Works Director for the City of Liberal was a city officer. The opinion noted that while an ordinance created the Public Works Department, no statute or ordinance specifically created the position of Public Works Director or dictated the position’s duties and responsibilities. In addition, the Public Works Director reported to the City Manager (who is a city officer in a city with a commission-manager form of government) and worked under the City Manager’s “guidance and direction.” For these reasons, the opinion concluded that the Public Works Director was not a city officer.

As can be seen, whether a particular person is a municipal officer ineligible for appointment to a municipal library board is a fact-specific question that will turn on issues such as the type of municipality, the form of municipal government, whether a statute or ordinance creates the position, and the person’s duties.

⁷ See, e.g., *Miller v. Bd. of County Comm’rs of Ottawa County*, 146 Kan. 481 (1937) (an appointed county engineer is a public officer); *Durflinger v. Artilles*, 234 Kan. 484 (1983) (a superintendent of a psychiatric hospital is a public officer).

⁸ See, e.g., Attorney General Opinion No. 81-219 (a city administrator is a public officer); Attorney General Opinion No. 95-68 (a member of a judicial nominating commission is a public officer).

⁹ *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316 (2001).

¹⁰ See, e.g., *Jagger v. Green*, 90 Kan. 153, 158 (1914) (a city health department “fieldman” is not a public officer).

¹¹ 234 Kan. 484 (1983) (disapproved of on other grounds by *Boulanger v. Pol*, 258 Kan 289, 298 (1995)).

¹² Attorney General Opinion No. 99-11 (citing *Durflinger*, 234 Kan. at 503).

¹³ *Durflinger*, 234 Kan. at 502 (citing *Miller*, 146 Kan. at 484); see also *Jagger*, 90 Kan. at 158 (“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 . . .”).

Joanne Budler
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Sincerely,

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