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December 2, 2016

ATTORNEY GENERAL OPINION NO. 2016-20

Brian J. Murphy
Allen County Sheriff
P.O. Box 433
1 N. Washington Street
Iola, KS 66749

Re: Counties and County Officers—County Commissioners—Eligibility to Office of Commissioner; City Office; Police Officer

Synopsis: As determined in Attorney General Opinion No. 82-8, a person who serves as a police officer holds a city office. Therefore, a person who serves as a city police officer is prohibited by K.S.A. 19-205 from serving as a county commissioner. Cited herein: K.S.A. 14-201; 14-205; 14-302; 19-205; Kan. Const., Art. 12, § 5; Kan. Const., Art. 15, § 2; K.S.A. 13-2903 (repealed).

* * *

Dear Sheriff Murphy:

As Sheriff for Allen County, you ask our opinion regarding whether a person may concurrently serve as a member of a board of county commissioners and a police officer for a city of the second class having the mayor/council form of government that is located in the county governed by the board. You request our assistance after the county attorney and the county counselor provided differing opinions regarding whether such service is precluded by K.S.A. 19-205 and whether the common law doctrine of incompatibility of offices is applicable.

Incompatibility of offices is a common law doctrine that precludes a person from concurrently serving in two offices 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."[1] Applicability of the doctrine, however, is subject to provisions in the state constitution and state statute. "The legislature decides who may qualify for public office. If the legislature has spoken, the statement supersedes common law, and the doctrine of incompatibility of office[s] does not apply."[2]

K.S.A. 19-205 states:

> Except as provided by K.S.A. 12-344, 12-345, [ ] 12-363 and 12-365, and amendments thereto, *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.
>
> Nothing in this section shall prohibit the appointment of any county commissioner to any state board, committee, council, commission or similar body which is established pursuant to statutory authority, so long as any county commissioner so appointed is not entitled to receive any pay, compensation, subsistence, mileage or expenses for serving on such body other than that which is provided by law to be paid in accordance with the provisions of K.S.A. 75-3223, and amendments thereto.[3]

The exceptions listed in the opening provision of K.S.A. 19-205 regard consolidation or unification of certain city and county offices, functions, services and operations and are not applicable to the situation you present. Therefore, it must be determined whether the position of city police officer is a state, county, township or city office.

The test for determining whether a position is a public office or public employment has been summarized in previous Attorney General opinions.

> The Kansas Supreme Court addressed the distinction between officers and other employees in *Durflinger v. Artiles*.[4] 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. In addition, *Durflinger* cited an earlier case holding that an officer has responsibility for results and the power of direction, supervision, and control.[5]

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[1] *Unified School District No. 501, Shawnee County v. Baker*, 269 Kan. 239, 248 (2000), quoting *Abry v. Gray*, 58 Kan. 148, 149 (1897).
[2] *Baker*, 269 Kan. at 243 (internal citation omitted).
[3] Emphasis added.
[4] 234 Kan. 484 (1983), overruled in part by *Boulanger v. Pol*, 258 Kan. 289, 298 (1995).
[5] Attorney General Opinion Nos. 2016-13; 2016-12; 2013-19.

The Kansas Supreme Court determined in *Haney v. Cofran*[6] that a city police officer holds a public office for purposes of tenure under Article 15, § 2 of the Kansas Constitution.[7]

> Does a policeman hold an office created by law? The Legislature has not actually descended into such details, but it has created municipalities and defined their powers and in general terms has authorized the creation of the position of a policeman in the cities of this state.
>
> In many respects a policeman is a municipal officer, but in other and important respects the Legislature and the courts have raised him out of the class of a mere subordinate or employé like a field man of a local department of health or a cellhouse man at the penitentiary.
>
> A policeman is a conservator of the peace and exercises many of the functions of sovereignty, and important duties are imposed upon him by the Legislature.
>
> This court has frequently recognized police officers as exercising the functions of sovereignty; and, being clothed with such extensive powers, they must be considered public officers. There is no end of authority that a policeman is a public officer.[8]

The Kansas Supreme Court's finding is in accord with the majority of the cases heard in other jurisdictions that have reviewed whether members of law enforcement hold positions of public office or public employment.[9]

The finding in *Haney* was applied in Attorney General Opinion No. 82-8, which addresses whether K.S.A. 19-205 precludes a person from serving as both a county commissioner and a part-time police officer for a city of the third class.

> The City of Rose Hill is a city of the third class. Police officers are appointed by the mayor with the consent of the council pursuant to K.S.A.

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[6] 94 Kan. 332, modified at 95 Kan. 335 (1915).

[7] In 1915, Article 15, § 2 of the Kansas Constitution stated, "The tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four years." According to *Haney*, the civil service act had the effect of extending a police officer's term to the entire period of good behavior, potentially extending it beyond the four-year limitation. The dissent was not convinced that a constitutional amendment was necessary before policemen could be placed under civil service regulations. Article 15, § 2 was amended in 1940 to exempt appointments under a merit system.

[8] *Haney*, 94 Kan. at 334 (internal citations omitted).

[9] 16A McQuillins, *Municipal Corporations*, § 45:18 (2016) ("A majority of the cases announce that members of a police department, including . . . the chief of police, police captains, police sergeants, . . . police officers, . . . and patrol officers, are public officers. Thus, police officers have been considered to be officers, and not employees, with respect to qualifications, compensation, tenure, dismissal, tort liability, and within the meaning of a workers' compensation act.").

> 15–204 which provides for the appointment of all city officers. In addition, the Kansas Supreme Court has characterized police officers as "city officers" in *Haney v. Cofran*, 94 Kan. 332 (1915). In that case, the Court found the statutory creation of the office, the sovereign functions exercised by police officers and the public nature of their duties as persuasive in determining that policemen are "officers" and not mere employees. Therefore, since police officers are recognized as city officers, a county commissioner would be prevented from holding said office by K.S.A. [ ] 19–205, even though the position is only part-time with a nominal salary.[10]

Opinions of three previous Attorneys General that address statutory prohibitions similar to K.S.A. 19-205 likewise followed *Haney* in deciding that the designated positions of law enforcement are public offices under the statutes, resulting in disqualification of the law enforcement officer from concurrently serving on the governing body of a city or county.[11]

We note that "[s]ince the adoption of the home rule amendment[12] 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."[13] The Legislature's view of whether a police officer holds public office, however, is reflected in two statutes that continue to exist. K.S.A. 14-201 and 14-205 are applicable to a city of the second class having the mayor/council form of government. The statutes provide:

> [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. Any officers appointed and confirmed shall hold an initial term of office of not to exceed one year and until their successors are appointed and qualified. Any officers who are reappointed shall hold their offices for a term of one year and until their successors are appointed and qualified. The council shall by ordinance specify the duties and

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[10] Attorney General Opinion No. 82-8 (internal citation omitted).

[11] *See* Attorney General Opinion Nos. 96-46 (K.S.A. 13-2903 [repealed]; relatives by blood or marriage of the mayor or any commissioner disqualified from holding any city office during the term of mayor or commissioners; city police officer holds a city office; son of a city commissioner disqualified from being appointed as a police officer during his father's term of office); 91-98 (K.S.A. 14-1302; city commissioners precluded from holding any office of profit under the laws of any state or the United States, or any county or other city office; deputy sheriff holds county office; person may not concurrently serve as city commissioner and deputy sheriff); 77-130 (K.S.A. 13-2903 [repealed]; position of a police officer is a public office; spouse of commissioner may serve as police department dispatcher if the person is a civilian employee and not a police officer). *See also* Attorney General Opinion No. 89-76 (reserve police officer holds public office for purposes of the common law doctrine of incompatibility of offices; offices of city councilmember and reserve police officer are incompatible).

[12] Kan. Const., Art. 12, § 5.

[13] Attorney General Opinion No. 2014-10, quoting Attorney General Opinion No. 78-336.

> compensation of the office holders, and by ordinance may abolish any office created by the council whenever deemed expedient.[14]
>
> All officers elected or appointed shall be qualified electors of said city, except that the city may appoint nonresidents as city attorney, municipal judge and as law enforcement officers when deemed necessary, including the appointment of nonresidents who also serve as city attorney, municipal judge or law enforcement officers of another municipality or public agency: *Provided*, That nothing herein shall authorize the appointment of nonresidents of this state. The city attorney shall be a qualified elector of the county in which said city is located or of an adjoining county. The removal from such city of any officer required to be a qualified elector shall occasion a vacancy in such office. The clerk shall enter every appointment to office, and the date thereof, on the journal of proceedings. The council may require all city officers, elected or appointed, to take and subscribe an oath and give bonds and security for the faithful performances of their duties.[15]

When reading these provisions in their entirety, it is clear the Legislature, at least in the appointment procedure, views a police officer as an officer, rather than an employee, of the city.[16]

As determined in Attorney General Opinion No. 82-8, we believe that a person who serves as a police officer holds a city office. Therefore, a person who serves as a city police officer is prohibited by K.S.A. 19-205 from serving as a county commissioner.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

DK:AA:RDS:sb

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[14] K.S.A. 14-201 (emphasis added).
[15] K.S.A. 14-205.
[16] *See* Attorney General Opinion No. 79-68 ("In accordance with K.S.A. 14–201, policemen in cities of the second class are 'officers' as opposed to 'employees' of such cities. . . .").