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September 14, 2022

ATTORNEY GENERAL OPINION NO. 2022- 8

Harry Joe Pratt, County Attorney
Sheridan County, Kansas
736 Main, P.O. Box 565
Hoxie, KS 67740

Re: Counties and County Officers—County Commissioners—Eligibility to Office of Commissioner; State, County, Township or City Office; County Hospital Clinic Director; Incompatibility of Offices

County and County Officers—Hospitals and Related Facilities—County Hospitals; Management of Hospital; Hospital Board; Powers and Duties of Board; Clinic Director; County Commissioner; Incompatibility of Offices

Synopsis: Sheridan County has established a hospital and provided for its governance by an elected board pursuant to K.S.A. 19-4601 *et seq.* K.S.A. 19-205 does not preclude a person employed in the hospital as a clinic director from serving as a county commissioner. The common law doctrine of incompatibility of offices does not preclude a person from concurrently serving as Sheridan County commissioner and clinic director. Cited herein: K.S.A. 19-205; 19-4601; 19-4605; 19-4606; 19-4607; 19-4610; 77-109.

* * *

Dear Mr. Pratt:

As Sheridan County Attorney, you request our opinion regarding whether K.S.A. 19-205 precludes a person who is employed as a clinic director in a county hospital from eligibility to the office of county commissioner. If it is determined that the person is not precluded under K.S.A. 19-205, you ask whether the common law doctrine of incompatibility of offices would preclude a person from concurrently serving as county commissioner and as the clinic director.

BACKGROUND

Exercising its authority under K.S.A. 19-4601 *et seq.*, Sheridan County operates a hospital.¹ The hospital includes the Sheridan County Health Complex, which consists of the Sheridan County Hospital, Hoxie Medical Clinic, Long Term Care Unit and Assisted Living Unit.² The Sheridan County Commission has provided for the management and control of the hospital by an elected board.³ The board is authorized to prepare a budget⁴ and adopt bylaws, rules and regulations for the management and control of the hospital.⁵ The board has selected a chief executive officer who oversees employment issues and operation of the hospital.⁶ A director is employed to oversee daily operation of the Hoxie Medical Clinic in accordance with the board's policies and procedures.⁷

We are asked to determine whether a person who is employed as the director of the Hoxie Medical Clinic may seek the office of Sheridan County Commissioner, and, if elected, may concurrently serve in both positions. We addressed similar situations in Attorney General Opinions No. 2016-12 and No. 2016-13. The following analysis is largely incorporated from those opinions.

ANALYSIS

Statutory Prohibition

"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 does not apply."⁸ K.S.A. 19-205 establishes who is eligible to serve as county commissioner.

(a) Except as provided by K.S.A. 12-344 and 12-345, and amendments thereto, and K.S.A. 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.*

¹ "[H]ospital' means a medical care facility as defined in K.S.A. 65-425, and amendments thereto, and includes within its meaning any clinic, school of nursing, long-term care facility, limited care residential facility, child-care facility and joint enterprises for the provision of health care services operated in connection with the operation of the medical care facility. . . ." K.S.A. 19-4601(c).

² Harry Joe Pratt, Correspondence, May 27, 2022; <https://schcmed.com/> (accessed July 31, 2022).

³ Harry Joe Pratt, Correspondence, July 22, 2022. K.S.A. 19-4605 authorizes a county commission to provide for management and control of the hospital by a board, the members of which are appointed by the commission or elected by the county's qualified electors on a nonpartisan basis.

⁴ K.S.A. 19-4607. An elected board submits its budget to the county clerk, apparently putting it outside the review of the county commission. See also K.S.A. 19-4606 (elected board may levy a tax for the purpose of operating, maintaining, equipping and improving a hospital).

⁵ K.S.A. 19-4610.

⁶ Harry Joe Pratt, Correspondence, May 27, 2022; <https://schcmed.com/> (accessed July 31, 2022). See K.S.A. 19-4610.

⁷ Harry Joe Pratt, Correspondence, July 22, 2022.

⁸ *Unified School District No. 501 v. Baker*, 269 Kan. 239, 243 (2000). See also *Stanley v. Sullivan*, 300 Kan. 1015, 1018 (2014) ("As a general rule, statutory law supersedes common law.").

(b) 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.

(c) Any county commissioner may serve as a volunteer in any capacity for an emergency medical service or ambulance service or as a volunteer fire fighter and may receive the usual compensation or other remuneration for such volunteer services.⁹

The exceptions listed in K.S.A. 19-205(a) regard consolidation or unification of certain city and county offices, functions, services and operations. Sheridan County is not pursuing such consolidations or unifications. Since the exceptions are not applicable, it must be determined whether the position of clinic director is a state, county, township or city office.

The Kansas Supreme Court addressed the distinction between officers and other employees in *Durflinger v. Artiles*.¹⁰ 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.¹¹

Clinic director is not a position created by statute or ordinance. The director does not serve a fixed term or tenure, but rather may have his or her status modified or terminated as determined by the hospital board or administrator. Any actions taken by the director must be in accordance with the hospital board's policies and procedures. The director does not exercise independent authority regarding the direction, supervision, and control of the hospital or clinic. As such, the clinic director fills a position of employment, rather than a public office. Based on the facts presented, the position of clinic director is not a state, county, township or city office.

Likewise, the position of clinic director is not a state board, committee, council, commission or similar body. Therefore, K.S.A. 19-205 does not preclude a person employed as a clinic director from serving as a county commissioner.

We have been unable to locate any other statute that might prohibit a person from concurrently holding the office of county commissioner and serving as the clinic director

⁹ K.S.A. 19-205 (emphasis added).

¹⁰ 234 Kan. 484 (1983), overruled in part by *Boulanger v. Pol*, 258 Kan. 289, 298 (1995).

¹¹ Attorney General Opinion Nos. 2016-13; 2016-12; 2013-19.

for a hospital established pursuant to K.S.A. 19-4601 *et seq.* Further, we have not located any statute that authorizes a person to hold both positions. Thus, because the Legislature has neither prohibited nor authorized the simultaneous holding of the positions, we turn to the common law as the legal authority that governs this situation.¹²

Common Law Prohibition

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.¹³

Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices.¹⁴

“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.”¹⁵ The Kansas Supreme Court has long applied the doctrine “where 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.”¹⁶

As noted above, the position of clinic director does not constitute a public office. The determination, however, does not end our review of the applicability of the common law doctrine of incompatibility of offices.

In *Dyche v. Davis*,¹⁷ the Kansas Supreme Court determined the doctrine applies when a person concurrently holds a public office and a position of public employment.¹⁸ “It is inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised.”¹⁹ Other state courts applying the common law doctrine to circumstances in which an office holder attempts to serve simultaneously as an employee in the same unit of government have reached the same

¹² See K.S.A. 77-109; *see also Baker*, 269 Kan. at 252 (“The legislature holds the trump card to resolve the question before us today, either by specific authorization or prohibition. However, that card has not been played. Until it has ... [w]e are obligated to apply the common-law doctrine of incompatibility of office in the absence of a specific legislative expression on dual office-holding.”).

¹³ *Baker*, 269 Kan. at 249.

¹⁴ *Dyche v. Davis*, 92 Kan. 971, 977 (1914). *See also Baker*, 269 Kan. at 248.

¹⁵ Attorney General Opinion No. 2014-03.

¹⁶ *Baker*, 269 Kan. at 248, quoting *Abry v. Gray*, 58 Kan. 148, 149 (1897).

¹⁷ 92 Kan. 971 (1914).

¹⁸ 92 Kan. at 977-79. *See also Baker*, 269 Kan. 248-49 (summarizing *Dyche*).

¹⁹ *Baker*, 269 Kan. at 239, Syl. ¶ 6.

conclusion.²⁰ The doctrine applies irrespective of whether the person draws two salaries.²¹ Abstaining from participating as a public official in actions that potentially would affect the person's role as public employee is not a legally satisfactory resolution.²²

The Kansas Supreme Court in *Unified School District No. 501, Shawnee County v. Baker*²³ reviewed whether the common law doctrine of incompatibility of offices precludes one person from concurrently serving as a school board member and a teacher in the same school district.

As we focus on the agreed facts before us, the inescapable conclusion is that Baker's positions are incompatible. By assuming the role of teacher and Board member, Baker occupies one position that is subordinate to the other. As Board member she is the employer and as teacher, the employee. In her capacity as Board member she sits on a policy-making body that negotiates with the teachers' collective bargaining representative, who is also her representative as a teacher. This is a clear conflict of interest. Similarly, Baker is subject to discipline by the Board. She may, under certain circumstances, be fired by it. The principal who must evaluate Baker's performance as a teacher indirectly answers to Baker as a board member. As Baker discharges her Board duties, her actions, no matter how well-intentioned, will be colored by the conflict inherent in her two positions.²⁴

The concerns expressed in *Baker* do not exist in the current situation. The elected hospital board, rather than the county commission, employs the clinic director. The hospital board develops the policies and procedures that the clinic director must follow. Any kind of supervision or discipline of the clinic director may be conducted by the administrator, at the discretion of the hospital board, independent of the county commission. The clinic director will not as county commissioner be in a position of supervising the supervisor. Given these facts, the common law doctrine of incompatibility

²⁰ See, e.g., *Township of Belleville v. Fornarotto*, 228 N.J. Super. 412 (1988) (elected office of township commissioner is incompatible with simultaneous position of housing inspector); *Rogers v. Village of Tinley Park*, 116 Ill.App.3d 437 (1983) (elected office of village trustee incompatible with employment as village police officer); *Kaufman v. Pannuccio*, 121 N.J. Super. 27 (1972) (office of city council member incompatible with employment as city police officer); *Otradovec v. City of Green Bay*, 118 Wis.2d 393 (1984) (office of alderman on city common council incompatible with employment as residential appraiser in city assessor's office). Following *Baker*, we have reached the same conclusion in opining on analogous circumstances. See Attorney General Opinion No. 2016-13 (person precluded from concurrently serving as county commissioner and economic development director); 2016-12 (person is precluded from concurrently serving as county commissioner and either a volunteer emergency medical technician in the same county or facility coordinator for the county emergency medical services system); 2012-15 (position of county commissioner incompatible with trustee for county hospital).

²¹ *Baker*, 269 Kan. at 239, ¶ 5.

²² See *Baker*, 269 Kan. at 251.

²³ 269 Kan. 239 (2000).

²⁴ 269 Kan. at 251.

of offices does not preclude a person from concurrently serving as Sheridan County commissioner and clinic director in the hospital established pursuant to K.S.A. 19-4605.

CONCLUSION

Sheridan County has established a hospital and provided for its governance by an elected board pursuant to K.S.A. 19-4601 *et seq.* K.S.A. 19-205 does not preclude a person employed in the hospital as clinic director from serving as a county commissioner. The common law doctrine of incompatibility of offices does not preclude a person from concurrently serving as Sheridan County commissioner and clinic director.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

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