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November 18, 2015

ATTORNEY GENERAL OPINION NO. 2015- 19

Dr. Susan Mosier, Secretary  
Kansas Department of Health and Environment  
1000 SW Jackson Street, Suite 540  
Topeka, Kansas 66612-1367

Re: Constitution of the State of Kansas—Judicial—Selection of Justices of the Supreme Court; Supreme Court Nominating Commission; Prohibition Against Members Holding Public Office by Appointment; Prohibition Against Holding Any Other Public Office by Appointment

Synopsis: A person selected by the Secretary of the Kansas Department of Health and Environment to serve as a Deputy Secretary in the Division of Environment does not hold a "public office by appointment," and therefore is not prohibited from simultaneously serving as a nonattorney member of the Supreme Court Nominating Commission. Cited herein: K.S.A. 20-119; 20-120; 20-124; Kan. Const., Art. 3, § 5.

\* \* \*

Dear Secretary Mosier:

You request our opinion on whether “a Deputy Secretary for Environment in the Kansas Department of Health and Environment’s Division of Environment, with no powers or duties authorized by statute, except those delegated by the Secretary of Health and Environment, [can] also serve on the Supreme Court Nominating Commission.”

The Supreme Court Nominating Commission (Commission) is a nine-member, nonpartisan body that is required by the Constitution of Kansas to nominate and submit

to the governor the names of three qualified persons for appointment to fill vacancies in the office of any justice of the Kansas Supreme Court.<sup>1</sup> The Commission consists of a chairperson (an attorney licensed and residing in Kansas),<sup>2</sup> as well as one attorney member and one nonattorney member from each of the four U.S. congressional districts.<sup>3</sup> The attorney members are elected by licensed attorneys residing in their respective congressional districts; the chairperson is elected by Kansas attorneys voting at large.<sup>4</sup> The four nonattorney members are appointed by the governor.<sup>5</sup>

Constitution of Kansas, Article 3, § 5(g) provides:

No member of the supreme court nominating commission shall, while he is a member, hold any other public office by appointment or any official position in a political party or for six months thereafter be eligible for nomination for the office of justice of the supreme court. The commission may act only by the concurrence of a majority of its members.

Determinative of the issue is whether the position of Deputy Secretary of the Department of Health and Environment is a “public office by appointment.”<sup>6</sup>

Attorney General Robert T. Stephan concluded, in Attorney General Opinion No. 87-65, that the public office by appointment prohibition of Article 3, § 5(g) refers to the common law concept of the “public office” discussed in *Durflinger v. Artiles*.<sup>7</sup>

It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent. . . .<sup>8</sup>

The Court also noted that a “public office” is defined as: “[a] position whose occupant has legal authority to exercise a government’s sovereign powers for a fixed period.”

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<sup>1</sup> Kan. Const. Art. 3, § 5(d).

<sup>2</sup> Kan. Const. Art. 3, § 5(e) and K.S.A. 20-119.

<sup>3</sup> Kan. Const. Art. 3, § 5(e), K.S.A. 20-120 and 20-124.

<sup>4</sup> Kan. Const. Art. 3, § 5(e), K.S.A. 20-119 and 20-120.

<sup>5</sup> Kan. Const. Art. 3, § 5(e) and K.S.A. 20-124.

<sup>6</sup> Because your opinion request is only focused on the first disqualification, we limit our opinion to whether the position of Deputy Secretary of Environment is a “public office by appointment.”

<sup>7</sup> 234 Kan. 502 (1983) reversed on other grounds, 727 F.2d 888, 10th Cir. (Kan.), Jan. 27, 1984 affirming decision.

<sup>8</sup> *Durflinger* at 502 (quoting 53 A.L.R. 595).

Under *Durflinger*, the essential characteristics of a public office are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of the sovereign function of government.<sup>9</sup> We adopt General Stephan's conclusion in Attorney General Opinion No. 87-65.

We have found no statute that provides for the creation, tenure or powers and duties of the position of Deputy Secretary in the Environment Division at the Kansas Department of Health and Environment. This makes it clear that the position does not meet the *Durflinger* test of public office. and if it is not a public office, it cannot be a public office by appointment. We conclude that a person selected by the Secretary of the Kansas Department of Health and Environment to serve as a Deputy Secretary in the Division of Environment does not hold a "public office by appointment," and therefore is not prohibited from simultaneously serving as a nonattorney member of the Supreme Court Nominating Commission.

Sincerely,

/s/Derek Schmidt

Derek Schmidt  
Attorney General

/s/Athena E. Andaya

Athena E. Andaya  
Deputy Attorney General

DS:AA:sb

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<sup>9</sup> *Durflinger* at 503, citing Black's Law Dictionary (5<sup>th</sup> ed. 1979) definition of "public office." Black's Law Dictionary (10<sup>th</sup> ed. 2014) defines "public office" to be "[a] position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period."