

Opinion No. 52-5623

December 29, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Tom Wiley Superintendent of Public Instruction State Department of Education
Santa Fe, New Mexico

{*335} This is in reply to your letter of December 17, 1952, in which you request an opinion as to whether or not a school teacher can hold legally the position of school teacher and County Commissioner, said teacher having recently been elected County Commissioner.

You also want to know if there is any statute which makes it illegal for said teacher to hold both positions. This involves the question of incompatibility of offices.

I fail to find any New Mexico case in point but I find the following in Section 70 of 42 Am. Jur. under heading of Public Officers:

"Incompatibility of offices does not, it has been said, depend upon the incidents of the offices. For instance the Courts, with some few exceptions, hold that mere physical inability to perform the duties of both offices personally does not constitute incompatibility. It is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one 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. They are generally considered incompatible {*336} where such duties and functions are inherently inconsistent and repugnant so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

I also find an Arizona Supreme Court case which is practically on all fours with your case. It is the case of Territory ex rel. Hawkins vs. Wingfield, Chairman, etc., reported in 15 Pac. 139. The facts in this case briefly are as follows:

"This was an action for mandamus. During the years 1885 and 1886 the relator was the probate judge of the county of Yavapai, in the territory of Arizona, and for said time was the county superintendent of public schools for said county. The defendant is now the duly - qualified chairman of the board of supervisors of said county of Yavapai.

The Thirteenth legislative assembly of the territory of Arizona passed an act entitled 'An act to establish a public school system, and to provide for the maintenance and supervision of public schools in the territory of Arizona,' which act was approved March 12, 1885. Section 31 of said act provides among other things, that the county superintendent of schools of the county of Yavapai shall have an annual salary of \$ 600, payable quarterly out of the 'School Fund' of said county, by a warrant drawn upon said fund in favor of such county superintendent, countersigned by the chairman of the board of supervisors of said county.

The said Thirteenth legislative assembly of Arizona also passed on the same day an act entitled 'An act to create the office of county assessor, to make the county treasurer ex officio county tax collector, and prescribe the salaries and duties of certain county officers of the county of Yavapai.'

Section 13 of said last-mentioned act provides that the probate judge of the county of Yavapai shall receive to his own use as full compensation for all services rendered by deputies, the salary of \$ 2,000, etc. Section 19 of said last mentioned act provides for the payment of such salary out of a fund created by said act known as the 'General Salary Fund,' on warrants drawn by the board of supervisors upon such fund. These acts were passed by the legislature, and were approved on the same day; and at the same time five acts relating to salaries of county officers were considered and passed, viz., one for each of the counties of Cochise, Mohave, Apache, Pima, Graham, and Yavapai. All these acts were approved March 12th, except Cochise and Mohave, which were approved on March 11th.

The county superintendent of schools shall have an annual salary of \$ 600, payable out of the {*337} 'School Fund.' The two salaries are payable out of different funds. The Court held that the officer is entitled to both salaries as ex officio superintendent of schools and as probate judge."

The County Commissioner is, of course, an elective office. There is no incompatibility in the duties of a teacher and of a County Commissioner. The duty of a County Commissioner would in no way conflict with the duties of that of a teacher except probably once every three (3) months in the class of county which you have reference, and for that day the teacher could probably get a substitute. The salary of teacher and County Commissioner are paid out of separate funds.

Therefore, it is my opinion, in view of the above authorities that the office of County Commissioner and the position of school teacher are not incompatible offices.

Section 10-342, N.M.S.A., 1941 Compilation, Pocket Supplement reads as follows:

"Incompatible office or service defined. -- Any public office or service, other than service in the Armed forces of the United States of America and any private employment of the nature and extent designated in Section 3 (§ 10-340) hereof is hereby declared to be incompatible with the tenure of public office or employment."

The above statute defines the term incompatible office and refers to Section 3 of Section 10-340 of the 1941, N.M.S.A., Pocket Supplement. However, this section 3 of Section 10-340, N.M.S.A., 1941 Compilation, Pocket Supplement, reads as follows:

"Permanent abandonment of office or employment -- Acceptance of other employment. -- Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized or who shall accept private employment for compensation and who by reason of such other public office or employment shall fail for a period of thirty (30) successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of duties of such public office and employment shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

These statutes do not apply to the facts in your case as the County Commissioner would probably be absent from teaching school once every three months.

Trusting that this fully answers your inquiry, I remain