

Opinion No. 54-6033

November 8, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Vincent M. Vesely Assistant District Attorney Silver City, New Mexico

{*499} In your letter of October 12, 1954, you request the opinion of this office upon the right of a person acting as constable to recover fees for serving civil and criminal papers in each of three fact situations.

You state that officer No. 1 receives a salary of \$ 290.00 per month and is considered a full time deputy sheriff. He is also elected a constable of a precinct in your territory and serves civil and criminal papers as constable.

In our Opinion No. 4781, dated August 27, 1945, a copy of which is herewith enclosed, it was expressed to be the opinion of this office that the offices of deputy sheriff and constable are necessarily incompatible, for the reason that a deputy sheriff, as an officer of his county, is precluded, both by constitutional provision and by statute, from retaining any of the fees accruing to him from the service of civil or criminal papers, whereas a constable is permitted by statute to retain certain specified fees accruing to him from his duties in serving such instruments for his own use.

Article 10, Section 1, of the New Mexico Constitution provides, in part:

". . . And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county."

Sections 15-4113, N.M.S.A., 1941, provides:

"All county officers shall respectively charge and collect all fees, commissions, mileage and per diem heretofore and now, or which hereafter may be authorized by law to be charged and collected for official services rendered by them, and shall keep an accurate and itemized account thereof, and on or before the tenth day of each month pay the same over to the county treasurer of their respective counties, accompanying each remittance by a verified copy of the itemized account covered thereby, which verified copy shall be retained on file by said treasurer. All such county officers shall in like manner account for and pay over to the county treasurer of their respective counties, all such fees, commissions, mileage and per diem heretofore earned and hereafter collected for official services rendered by them from the respective dates when they qualified as such officers."

{*500} It is apparent from Section 15-3811, N.M.S.A., 1941, that deputy sheriffs occupy the status of "county officers" just as fully as do sheriffs. That section provides:

"The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals, with the same effect as though they were executed by the respective sheriffs."

Thus, it is apparent that deputy sheriffs are entitled to no other compensation for the performance of their duties, which include the service of civil and criminal papers as authorized by statute, than their salaries, and that all fees recovered by them in connection with the performance of such duties must be remitted to the county treasurers of their respective counties.

Constables, on the other hand, are permitted to collect certain specified fees by Section 38-1902, N.M.S.A., 1941, and it is not required that they should turn the fees so collected over to any governmental agency.

It was the opinion of this office in the said Opinion No. 4781 that the incompatibility between the offices of deputy sheriff and constable is so great that a vacancy would arise in the office of deputy sheriff, in the event that a salaried deputy sheriff sought to collect and to retain fees for serving papers as a constable, by reason of Section 10-301 (8), N.M.S.A., 1941, which provides that a vacancy will result (in a county office):

"By an officer accepting and undertaking to discharge the duties of another incompatible office."

It is our conclusion at this time that Opinion No. 4781 was sound, and that a salaried deputy sheriff should not undertake to recover for himself fees for the performance of duties in connection with the service of civil and criminal papers, and that the performance, by such a deputy sheriff, of the duties of a constable, in such a manner, will cause a vacancy to arise by operation of statute in his office of deputy sheriff.

You state that officer No. 2 is not a constable but a chief of police in a community in your district, and that he receives a salary of \$ 75.00 per month to act as a deputy sheriff. During the absence of the regular constable for that territory he acts in emergencies as constable to serve criminal papers.

We are of the opinion that what we have said above with regard to officer No. 1 is applicable as well to the case of officer No. 2. As a salaried deputy sheriff, the chief of police is not entitled to any other compensation than his salary for the performance of any of the duties pertaining to the office of deputy sheriff, which duties include the service of criminal papers.

You state that officer No. 3 is a full time officer at a mining camp, but that he does not receive any compensation whatever from the county as a deputy sheriff, although he holds a deputy sheriff's commission. He is an elected constable in his precinct and serves both civil and criminal papers as such constable.

We believe that our Opinion No. 4781 does not have application to the fact situation stated above. We believe that Article 10, Section 1, of our Constitution applies only to prohibit a salaried officer from retaining for himself any fees earned by him, and that incompatibility between the offices of deputy sheriff {*501} and constable sufficient to bring Section 10-301 (8) into operation arises only when a salaried deputy sheriff, who is compensated by such salary for his services in serving civil and criminal papers, seeks to recover additional compensation therefor in the form of constable fees. While it may be a poor practice for one person to hold both the office of deputy sheriff and that of constable, we believe that no fatal incompatibility arises between the two offices unless the person holding them seeks to recover compensation for his services in both capacities.

In answer to your final question, we believe that a salaried deputy sheriff has no more right to recover constable fees for the service of papers served in connection with cases originating in his own precinct, than he has to recover such fees for the service of papers connected with proceedings originating in precincts other than his own.

Trusting that the foregoing will answer your questions satisfactorily, I am

By: Henry A. Kiker, Jr.

Assist. Attorney General