Opinion No. 57-298

November 20, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal, Assistant Attorney General

TO: Mr. Norman Hodges, District Attorney, Sixth Judicial District, Silver City, New Mexico

QUESTION

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May a Probate Judge be appointed to act as a Deputy District Court Clerk and receive a salary therefor?

CONCLUSION

Yes, unless the Probate Judge by reason of the other duties as a matter of fact abandons the office.

OPINION

ANALYSIS

Nothing appearing to prohibit the appointment of a Probate Judge as Deputy District Court Clerk in the qualification or limitations of either under the pertaining statutes, recourse must be made to Chapter 5 of N.M.S.A., 1953, for general rule or regulation of Public Offices and Employees.

Section 5-3-40 (Chapter 123, § 3, Laws 1943) provides:

"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 or private 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 the duties of of such public office and employment,** shall be deemed to have resigned from and to have permanently abandoned his public office and employment" (Underlining ours.)

Section 5-3-42 (passed by the same Legislature at the same time) provides:

"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 (5-3-40) hereof** is hereby declared to be incompatible with the tenure of public office or employment." (Underlining ours.)

If we accept the terms of § 5-3-42 without the qualifying reference therein subjecting the section to § 5-3-40, such interpretation would make meaningless both the reference to and the entire text of § 5-3-40. This office has neither the authority nor the inclination to characterize as surplusage an act of the Legislature, especially when on the face of the inconsistent statute a reference is made indicating legislative awareness of both prohibitions.

Further, by weight of authority too ponderous to need detailment here, if two statutes appear in contradictory position, such interpretation as well reconcile the seeming contradiction will be favored.

Further, in the interest of efficient public service, where a public office or employment is, by its obvious nature, less than a full time occupation, and is compensated as less than a full time occupation, blindly characterizing it as such will result in such offices and employments being filled by incompetents -- an intention we refuse to impute to our Legislature.

In conclusion, it might be emphasized that none of the foregoing precludes a legal abandonment of public office in accordance with the terms of § 5-3-40, nor will the holding of two offices, factually or statutorily incompatible, be countenanced.