

Opinion No. 62-98

July 25, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Richard A. Parsons, Assistant District Attorney, Ruidoso, New Mexico

QUESTION

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1. Are the offices of Assistant District Attorney and City Attorney of a municipality located within such judicial district legally incompatible?

CONCLUSION

1. No.

OPINION

ANALYSIS

Section 14-15-5, N.M.S.A., 1953 Compilation empowers municipalities to appoint city attorneys to serve in behalf of such municipality. This section specifically designates that a city attorney is an appointive officer. This section provides in applicable part as follows:

". . . The appointive officers of cities are a city marshal, members of the police, a city attorney and such other officers as may be, by ordinance provided for . . . The city attorney shall perform such duties, and upon such salary and compensation, as the city council may by ordinance, declare . . ."

As provided in Section 17-1-2, N.M.S.A., 1953 Compilation, it is also recognized that assistant district attorneys appointed by a district attorney hold public office and are public officers. Section 17-1-2, *supra*, sets out in part:

". . . Every appointment of an assistant district attorney shall be in writing under the hand of the district attorney . . . and the person so appointed shall take and file in the office of the clerk of the district court of the judicial district wherein the district attorney resides, **an oath of office as is now prescribed by law for district attorneys** before entering upon his duties as such assistant district attorney . . ." (Emphasis supplied).

In **Haymaker, v. State, ex rel. McCain**, 22 N.M. 400, 168 P. 248, L.R.A. 1917 D, 210, the issue of incompatibility between public offices was dealt with by the New Mexico Supreme Court, and in that case the court recognized that:

"The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both."

Particularly analogous to the question presented herein, is the case of **State ex rel. Chapman v. Truder**, 35 N.M. 49, 289 P. 594. In this case the New Mexico Supreme Court considered the question of whether or not the office of district attorney and the position of Mayor of the City of Las Vegas, New Mexico, were incompatible. The Court after a thorough consideration of the duties and responsibilities of the two offices, determined that: ". . . We are unable to discover from our examination of the statutes prescribing the duties of the officers of the district attorney and Mayor, where one is subordinate to the other or where a contrariety and antagonism would result in the attempt of one person to faithfully and impartially discharge the duties of both."

A careful reading of the **Haymaker** case, supra, **State ex rel. Chapman v. Truder**, supra, and a review of the numerous Attorney General's Opinions dealing with the question of incompatibility of various offices, leads us to the definite conclusion that although a city attorney and an assistant district attorney are both "public offices" within the contemplation of the statutes cited above, the two offices are not fatally incompatible in nature so as to preclude the same person from properly holding both positions at the same time, provided that the duties of both offices may both be efficiently discharged. See also our former Attorney General's Opinions, No. 57-23, dated February 8, 1957; No. 58-237, dated December 19, 1958; and No. 60-82, dated May 4, 1960.