

Opinion No. 64-73

June 2, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Honorable William L. Place, Justice of the Peace, Precinct No. 1, Valencia County, Los Lunas, New Mexico

QUESTION

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1. May a justice of the peace who resides in an incorporated village, and whose precinct covers said village run for the position of village mayor and remain as justice of the peace?

CONCLUSION

1. Yes.

OPINION

ANALYSIS

The question presented herein is novel only in that it involves the offices of justice of the peace versus that of mayor. It customarily arises upon an application of Section 5-3-1, N.M.S.A., 1953 Compilation which provides that an office becomes vacant when, among other reasons, an officer accepts and undertakes to discharge the duties of another incompatible office. One definition of an incompatible office is set forth in the following sections of the New Mexico Statutes Annotated:

"5-3-42. Definition of incompatible office, service and employment. -- 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."

"5-3-40. Permanent abandonment of office, what constitutes. -- **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 the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment." (Emphasis added)

It is to be noted in reading the above that it is not only the acceptance of another public office for which a salary or compensation is authorized that will automatically constitute the abandonment of the incumbent's public office. In addition, it must be found that because of such other public office the incumbent fails for thirty 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 such public office. Certainly, these sections can become operative only if and when these facts are present. Thus, we are not here directly concerned with this statutory incompatibility except to point out that it exists.

We stated previously that the question of the incompatibility between offices is not novel. This is evident by the attorney general opinions and New Mexico case law annotated under Section 5-3-1, supra, which have dealt with this question. These have furnished other criteria for determining incompatibility, and, thus have formed a basis for this opinion.

In the case of **State ex rel. Chapman vs. Truder**, 35 N.M. 49, 289 P.595, it was decided that the office of district attorney and mayor of a city are not incompatible and may be held by one person at one and the same time. The court applied the test of incompatibility adopted in the case of **Haymaker v. State**, 22 N.M. 400, 168 P.248, where it was stated: (Citing **People v. Green**, 58 N.Y. 295):

"In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible.

"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."

It appears that the primary criterion in determining incompatibility (or the lack thereof) relates to possible conflict in carrying out the duties required by the positions in question. If no such conflict were found possible, or probable for that matter, and the same person could conscientiously and effectively discharge the duties of both offices at the same time, incompatibility could not fairly be said to exist. Are then the offices of justice of the peace and village mayor incompatible? We believe not. The justice of the peace is a court, when publicly administering justice delegated to him by law, **State v. Lazarovich**, 27 N.M. 282, 200 P.422, and as such is invested with the judicial power of the state, within the limits prescribed, pursuant to Article VI, Section 1 of the New

Mexico Constitution. The office of justice of the peace would certainly not be subordinate to the mayor. The functions of each are separate and distinct, one being of the judicial and the other of the executive branch of government. A justice of the peace is a precinct officer (See Attorney General Opinion No. 61-50 dated June 20, 1961), whereas a mayor is a city, town or village officer, so that it does not appear that there would be any overlapping of duties. There is however, one permissible occurrence which should be noted in this inquiry. This involves the possible appointment of a justice of the peace to the office of municipal judge during the temporary incapacity or absence of any municipal judge, under Section 37-1-5, N.M.S.A., 1953 Compilation. The governing body of the municipality is given the power to establish a procedure for such appointments by ordinance, under Section 37-1-5, supra. So it is possible that, in line with our conclusion herein, a single person might, at any one time, be charged with carrying out the functions of the offices of mayor, justice of the peace and acting municipal magistrate. It is our understanding that such appointments are made frequently and this is especially true in our smaller communities. However, whether or not a person is acting in his capacity as a justice of the peace or municipal judge, he would still be concerned only with judicial and not administrative or policymaking functions. A mayor, on the other hand, is by statute (14-17-2, N.M.S.A., 1953 Compilation) the chief executive officer of a village. This distinction however is not to be construed as a reply to a question of compatibility between the offices of municipal magistrate and village mayor. Thus, neither do we, by this opinion, pass upon any question of compatibility between the offices of justice of the peace and village mayor in the event such justice of the peace were appointed to the office of municipal judge under Section 37-1-5, supra, temporarily or otherwise.

It is our opinion, based upon the foregoing, that the office of mayor of an incorporated village and the office of justice of the peace where the latter's precinct covers said village are not incompatible. These offices may be held by one and the same person at the same time. We do, however, limit our opinion to the specific fact situation posed herein, since it is possible that even a slight change in circumstances, e. g. residency, would render a person incapable of meeting the requirements for holding both offices.