

## Opinion No. 65-26

February 10, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Wayne C. Wolf, Assistant Attorney General

**TO:** Senator George D. Amaya, New Mexico State Senate, State Capitol Building, Santa Fe, New Mexico

### QUESTION

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May an elected City Treasurer also hold the position of recreation director and receive compensation for each position?

#### CONCLUSION

See analysis.

### OPINION

#### {\*47} ANALYSIS

The Constitution of New Mexico in Article XX, Section 9 prohibits state officers from receiving compensation other than their salary. This section does not specifically state that a state officer is prohibited from holding two positions but since it applies only to state officers it does not constitute a prohibition against city officials. Likewise, there is no specific statutory prohibition with respect to city treasurers or municipal recreation employees that would prohibit their holding two offices. Unless municipal ordinances contain a prohibition against such duality we must conclude that there is no express prohibition against a city treasurer acting also as a recreation director.

The answer to your question, therefore, depends on the compatibility of the positions in question. This matter has been the subject of several Attorney General's opinions as well as at least two opinions from the New Mexico Supreme Court.

In **Haymaker v. State ex rel McCain**, 22 N.M. 400, 168 Pac. 248, the Supreme Court said:

"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."

As that case indicates, incompatibility may arise because of the physical impossibility of performing the duties of both offices, or it can arise because of the inconsistency of the functions of both offices. Physical incompatibility is illustrated by one individual attempting to perform two full time positions or one full time and one part time position. Physical incompatibility is treated in Sections 5-3-40 through 5-3-43 New Mexico Statutes Annotated, 1953 Compilation. The statutory test is a failure by the official for thirty consecutive days to devote his time to the usual and normal extent, during ordinary working hours, to the duties of his office.

Incompatibility of two offices may also arise because of an inconsistency between the duties of the two offices. See **Haymaker v. State ex rel. McCain**, supra. Under the test laid down in that case, however, we are forced to conclude that the office of city treasurer and recreational director are compatible. The duties of the city treasurer are found in Sections 14-18-1 through 14-18-14 New Mexico Statutes Annotated, 1953 Compilation and in general they relate to methods of accounting, custody of warrants and vouchers, and the reporting of financial condition. We fail to see any inconsistency between these duties and {48} those required of a recreation director.

We conclude, therefore, that the only incompatibility which can exist between the office of city treasurer and that of recreation director is a physical incompatibility. Whether or not that incompatibility exists depends on whether the individual can devote his time to the duties of his public office to the normal extent during ordinary working hours.