

## Opinion No. 66-91

July 22, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

**TO:** Mr. E. H. Williams, Jr., District Attorney, Dona Ana County Courthouse, Las Cruces, New Mexico

### QUESTION

#### QUESTION

May a full-time, paid deputy sheriff also serve as a village marshal and be paid for serving in such capacity?

#### CONCLUSION

No.

### OPINION

#### {\*122} ANALYSIS

The basic question is whether the office of a paid deputy sheriff is incompatible with that of a municipal police officer. The case of **Haymaker v. State**, 22 N.M. 406, 163 P. 248, L.R.A. 1917D 210 is the leading case in this jurisdiction on this question. It held that incompatibility between offices would result if the duties of such offices are inconsistent with each other or if it is physically impossible for the same person to discharge the duties relating to one office at the same time as he should be discharging the duties relating to the other office.

There are numerous opinions of this office dealing with the question of whether specific offices are incompatible.

The following opinions are particularly relevant: **Opinion No. 54**, Report of the Attorney General 1941-42 held that the office of a paid deputy sheriff was not incompatible with that of weighmaster so long as he, as deputy sheriff, was not assigned the duty of acting as weighmaster.

**Opinion No. 6305**, Report of the Attorney General, 1955-56 held that there was no incompatibility between the office of deputy sheriff and policeman of an Indian tribe. He apparently was an unpaid deputy.

**Opinion No. 6033**, dated November 8, 1954, Report of the Attorney General, 1953-54, held that the office of deputy sheriff and chief of police were incompatible.

A municipal police officer is appointed pursuant to the authority of Section 14-11-4 N.M.S.A., 1953 Compilation (P.S.) and performs the duties set forth in Section 14-12-2 N.M.S.A., 1953 Compilation (P.S.) as follows:

"14-12-2. POLICE OFFICERS. -- A. The police officer of a municipality shall:

(1) execute and return all writs and processes as directed by the municipal judge;

(2) **serve criminal writs and processes in any part of the county** wherein the municipality is situated; and

(3) within the municipality,

(a) **suppress all riots, disturbances and breaches of the peace;**

(b) **apprehend all disorderly persons;**

(c) **pursue and arrest any person fleeing from justice;** and

(d) **apprehend any person in the act of violating the laws of the state** or the ordinances of the municipality and bring him before competent authority for examination and trial.

B. In the discharge of his proper duties, a police officer **shall have the same powers and be subject to the same responsibilities as sheriffs** or constables in similar cases." (Emphasis added.)

A paid deputy sheriff is authorized under the provisions of Section 15-40-11 N.M.S.A. 1953 Compilation to perform all of the duties of a sheriff which the sheriff authorizes him to {123} perform. He must give an oath that he will to the best of his ability perform all of the duties of his office and may be required to execute a bond to such effect. Section 15-40-5 N.M.S.A., 1953 Compilation.

Under the provisions of Section 15-40-12, N.M.S.A., 1953 Compilation, all sheriffs are on duty **at all times**. The same would be true of paid deputies even though their specific duties might be restricted. A sheriff is a conservator of the peace and so is a deputy sheriff, Section 15-40-12, supra. A municipal police officer under Section 14-12-2, is also charged with such duties. A paid deputy sheriff and a municipal police officer are law enforcement officers with many of the same duties.

It is apparent that one cannot on a full-time basis, as is required by law, be a conservator of the peace and law enforcement officer as a paid deputy sheriff and at the same time perform similar functions as a municipal police officer. Although the functions

of the two positions are not such as to render them incompatible, the required duties render them physically incompatible to the extent that the same person cannot serve as a paid deputy sheriff and as a municipal police officer. This is particularly true since the sheriff could, if he desired, require the paid deputy sheriff to perform most of the duties that would normally be required of the municipal police officer.