

## Opinion No. 67-74

June 5, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. Louis R. Lopez Adm. Assistant to the Court Administrator Supreme Court Building Santa Fe, New Mexico

### QUESTION

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Are the offices of city magistrate and city clerk compatible?

#### CONCLUSION

See analysis.

### OPINION

#### {\*109} ANALYSIS

The leading New Mexico case in connection with the subject of incompatibility of office is **Haymaker v. State**, 22 N.M. 400, 168 Pac. 248, wherein our Supreme Court stated this test (citing *People v. Green*, 58 N.Y. 295):

"In legal contemplation, incompatibility between two offices is an inconsistency between 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 {\*110} in the attempt by one person to faithfully and impartially discharge the duties of both."

The duties of the municipal clerk are contained in Sections 14-11-4, 14-21-1, 14-36-1 and 14-41-4, N.M.S.A., 1953 Compilation (1965 P.S.). An examination of these statutes reveals that in all instances a municipal clerk is charged with duties of a nature which are purely subordinate to and in aid of the governing body of the municipality.

Sections 37-1-1 through 37-1-9, N.M.S.A., 1953 Compilation, establish the powers and duties of the municipal magistrate courts in the State. By the terms of this Article, municipal magistrates are charged with the power to hear cases arising under

ordinances of the municipality. The salary of the municipal magistrate is prescribed by ordinance of the municipality. The governing body of the municipality may fill a vacancy in the office of municipal magistrate in the event of temporary or permanent absence of a municipal magistrate. Finally, each municipal magistrate is charged with the duty of making monthly reports and remittances to the governing body of the municipality not later than the 10th day of the month following the collection of the moneys.

From an analysis of the duties and powers of both the municipal magistrate and the municipal clerk, it can be seen that there is no way in which the municipal magistrate can control the office or functions of the municipal clerk or that the municipal clerk can control the office or functions of the municipal magistrate. Neither is there an overlapping of functions of the two offices which would create a contrariety or antagonism if the person should attempt to faithfully and impartially discharge the duties of both offices.

Finally, we point out that we are not familiar with whether the office of city clerk is a full-time position in the municipality in question. In the event that both the office of city clerk and the office of municipal magistrate are not full-time positions in that municipality, we would conclude that those two offices are not incompatible and may be held by the same person at the same time. However, we caution that if either office is considered a fulltime position, then a **physical** incompatibility exists as to the two offices.

June 8, 1967

Mr. Louis R. Lopez

Administrative Assistant to the Court Administrator

Supreme Court Building

Santa Fe, New Mexico

## **ADDENDUM TO OPINION**

NO. 67-74

In Opinion of the Attorney General No. 67-74, it was presumed that the municipal clerk in question was not charged with the duty of enforcing municipal ordinance. If, however, the municipal governing body has, by ordinance, given the municipal clerk the duty of enforcing any municipal ordinances then a contrariety and antagonism would exist between the offices of municipal clerk and municipal magistrate. This conflict would arise because one person would be called upon to file a cause, as clerk, in the municipal magistrate court and then, as magistrate, he would rule on the same case.

Although no contrariety and antagonism exists in the enabling laws of the municipal clerk and the municipal magistrate one could be created. In some municipalities

ordinances exist requiring the municipal clerk to file certain ordinance violation cases in the court of the municipal magistrate. In those municipalities, the two offices are, therefore, incompatible and may not be held by the same person.

By: Paul J. Lacy

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