

Opinion No. 68-111

November 7, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Nick Cardenas Municipal Judge Village of Cimarron Cimarron, New Mexico

QUESTION

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Is it permissible for a city clerk to also hold the office of municipal judge?

CONCLUSION

See analysis.

OPINION

{*179} In addition to election duties, the duties of a city clerk are spelled out in Section 14-12-1, {*180} N.M.S.A., 1953 Compilation, of the Municipal Code as follows:

"A. Keep in custody all minutes, ordinances and resolutions approved by the governing body;

B. Attend all meetings of the governing body;

C. Record all proceedings, ordinances and resolutions of the governing body; and

D. Upon request, furnish copies of municipal records. The clerk may charge a reasonable fee for the cost of furnishing copies of municipal records."

Municipal judges have jurisdiction over all offenses and complaints under ordinances of the municipality and may issue subpoenas and warrants and punish for contempt. The issue is whether an incompatibility exists between the city clerk's job and the municipal judge's job. This may be either an incompatibility of functions or a physical incompatibility.

In **Haymaker v. State ex rel McCain**, 22 N.M. 400, 403, 163 Pac. 248 (1917) the New Mexico Supreme Court set forth the definition of incompatibility of office because of inconsistent functions as follows:

"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." (Citing case).

Under the above definition of incompatibility of office, it is our opinion that no incompatibility of office exists because of inconsistency of functions between the offices of city clerk and municipal judge. This opinion is consistent with Attorney General Opinion No. 58-221, issued November 6, 1958, where we said that there was no incompatibility between the offices of police judge and traffic violations director.

Physical incompatibility may arise under Sections 5-3-40 through 5-3-42, N.M.S.A., 1953 Compilation. The test of physical incompatibility 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 performance of the duties of his office. One cannot perform two full time positions or one full time position and one part time position at the same time. See Attorney General Opinion 65-26, issued February 10, 1965. We are told in the present case that the individual is serving in the capacity of municipal judge after his working hours as city clerk. Under these facts we find no physical incompatibility of office.

By: Gary O'Dowd

Assistant Attorney General