

## Opinion No. 69-35

April 23, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Justin Reid, Assistant Attorney General

**TO:** Mr. Clovis O. Herrera, Valencia County Assessor, P.O. Box 186, Los Lunas, New Mexico 87031

### QUESTIONS

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May a duly elected county assessor lawfully be a candidate for the position of delegate to the forthcoming Constitutional Convention?

#### CONCLUSION

Not without being subject to legal sanctions.

### OPINION

#### {\*53} ANALYSIS

This office has recently rendered an opinion that the position of delegate to the Constitutional Convention is not a "public office" within the meaning of the State Personal Act (Attorney General Opinions of 1969, No. 69-28), since the position is both "temporary and occasional", **State v. Quinn**, 35 N.M. 62, 290 P.2d 786 (1930).

In addition, it is clear that the legislature in calling the Constitutional Convention intended that the holding of public office not be, insofar as possible, a disqualification for the position of delegate to the convention (Section 14, Chapter 134, Laws of 1969). We do not construe this section to mean, however, that an elected office holder may take a leave of absence or otherwise be relieved of his official duties while serving as a convention delegate. If so interpreted, the section would be of doubtful validity.

The office of county assessor is {\*54} a full-time, elective position with specified statutory duties to be carried out during normal working hours (Sections 15-38-1 and 72-2-1, et seq., supra). The position of delegate to the Constitutional Convention is a full-time, elective position for a continuous period of not to exceed 60 days with specified duties which will presumably be carried out during both normal working and evening hours (Section 15, Chapter 134, Laws of 1969).

Our Supreme Court, in a line of cases extending back to **Haymaker v. State ex rel., McCain**, 22 N.M. 400 (1917), has recognized that physical incompatibility between two

public positions -- that is, the fact that the duties of both cannot be physically performed by one person at the same time -- is a ground for legal sanctions against a person attempting to hold such positions.

In our opinion, anyone holding the office of county assessor, or any other fulltime, elective office, is physically incapable of performing the duties of that office and those of delegate to the Constitutional Convention at the same time. There being no way in which he could be lawfully relieved of his official duties during the convention session, he would in serving as a delegate, be holding incompatible positions, would be subject to suspension or removal under the provisions of Section 5-3-1, et seq., supra.

It would also clearly be unlawful for an elected official to continue to receive his salary while serving as delegate to the Convention.

In the case of some elective offices, e.g., that of legislator, there would, of course, be no such physical incompatibility (AG Opinions of 1967, No. 67-36).

All that has been said before applies as well to the use of duty hours to campaign for the office of delegate during the approximate six weeks between filing for the position and the election of delegates.