Opinion No. 70-67

July 17, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Honorable Kermit E. Nash District Judge 5th Judicial District Post Office Box 2099 Hobbs, New Mexico 88240

QUESTIONS

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Can a salaried city attorney accept the office of state magistrate and retain his city attorney position?

CONCLUSION

See Analysis.

OPINION

*{*114}* **ANALYSIS**

The office of magistrate is an elective office. Section 36-1-3, N.M.S.A., 1953 Compilation, (1969 P.S.). The personal qualifications for a magistrate are provided for in Section 36-2-1, N.M.S.A., 1953 Compilation, (1969 P.S.).

A city attorney is not an elected official, he is appointed to his position by the governing body of a municipality. Section 14-11-4, N.M.S.A., 1953 Compilation.

The Canons of Judicial Ethics, Section 31, entitled Private Law Practice, states in part:

". . . In Inferior Courts, [the practice of law] in some states . . . is permitted because a county or municipality is not able to pay adequate living, or compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice, whereby he utilizes or seems to utilize his judicial position to further his professional success. He should not practice in the Court which he is a judge, even when presided over by another judge or appear therein for himself in any controversy."

Canon 24 of the Canons of Judicial Ethics, entitled Inconsistent Obligation, states:

"A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will, in any way, interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

An attorney representing a municipality would not be able to appear before the magistrate court in his capacity as a municipal attorney, if he was also the magistrate.

It is significant to note that in districts which contain more than one magistrate, it would be possible for the city attorney to bring municipal cases before another magistrate. However, in districts in which there is only one magistrate, Canon 31 would create the situation that there would be no magistrate court available for the municipality.

We do not consider the problem of the statutory prohibition against holding incompatible offices which is raised in Section 5-3-1, and Section 5-3-3, N.M.S.A., 1953 Compilation, as interpreted in **Haymaker vs. State, ex rel. McCaine,** 22 N.M. 400, 163 P.2d 248 (1917), because the city attorney is a position of employment as opposed to a public office. Section 5-3-1, supra, does not apply to positions of employment.

The Administrative Officer of the Courts has promulgated no regulations which would prohibit a city attorney or any other attorney from serving as a magistrate.

The 1969 Annual Report of the Director of the Administrative Office of the Courts shows that Magistrate District 2 (Hobbs) in Lea County had a criminal case load of 1,220, and a civil case load of 537 for a total of 1,757 cases in 1969. In view of these statistics, there may be a physical impossibility for one person to perform these duties and the duties of city attorney. Physical incompatibility is *{*115}* described by Section 5-3-40 through 5-3-43, N.M.S.A., 1953 Compilation.

We must conclude that there is no legal prohibition precluding a city attorney from serving as a magistrate, but if there is only one magistrate court available there may be ethical considerations, and depending on the circumstances there may be strong practical considerations. The final determination of the physical consideration can only be made by the appointing body.

By: Frank N. Chavez

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